Reclamation of fugitives from service

DECLAMATION OF FUGITIVES FROM SERVICE.

AN ARGUMENT FOR THE DEFENDANT, SUBMITTED TO THE SUPREME COURT OF THE UNITED STATES, AT THE DECEMBER TERM, 1846, IN THE CASE OF WHARTON JONES vs. JOHN VANZANDT.

BY S. P. CHASE.

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ARGUMENT.

MR. CHIEF JUSTICE AND JUDGES:

I beg leave to submit to your consideration an argument in behalf of an old man, who is charged, under the act of Congress, of February 12, 1793, with having concealed and harbored a fugitive slave.

Oppressed, and well nigh borne down by the painful consciousness, that the principles and positions, which it will be my duty to maintain, can derive no credit whatever from the reputation of the advocate, I have spared no pains in gathering around them whatever of authority and argument the most careful research, and the most deliberate reflection could supply. I have sought instruction wherever I could find it; I have looked into the reported decisions of almost all the state courts, and of this court; I have examined and compared state legislation and federal; above all, I have consulted the constitution of the Union, and the history of its formation and adoption. I have done this, because I am well assured, that the issues, now presented to this court for solemn adjudication, reach to whatever is dear

in constitutional liberty, and whatever is precious in political union. Not John Vanzandt alone—not numerous individuals only—but the States also, and the Nation itself must be deeply 4 affected by the decision to be pronounced in this case. I ask, therefore—and the character of this venerable court strongly assures me I shall not ask in vain,—for a deliberate, unprejudiced, and thorough examination of the several positions I shall assume, and of the reasonings and arguments by which they are defended.

I shall discuss the issues, presented by the record, with freedom and with earnestness: but I shall advance nothing in the character of a mere advocate, bound to his cause only by his retainer. When great questions, affecting the most sacred personal rights of the People, and the most delicate relations of the States, and the most important duties of the Government, are to be examined before a tribunal clothed with the awful and affecting responsibility of final decision, it ill becomes a lawyer, called to bear a part in the discussion, to strive for victory in disputation, or the triumph of a side. I shall do no such violence to my own convictions of right and duty, as to urge here any argument or statement for which I am not willing to be held responsible as a citizen and as a man.

And here I will frankly say, at the outset, what all must know, that the counsel for the defendant cannot but feel.—I am, I confess, somewhat embarrassed by the peculiar constitution of the tribunal which I address.

I do not, indeed, permit myself to doubt that every consideration of interest, and every feeling of prejudice will be, as far as practicable, excluded from all influence upon the decision of the Court. On the contrary, the expectation, which I indulge with confidence, of a decision favorable to the defendant upon some of the questions presented by the record, is fully sanctioned by the weight of reason and authority, which the impartiality 5 of judges in slaveholding states has supplied, or has greatly increased.

Other questions, however, are presented and must be discussed, in the argument of which I must expect to encounter some hostile prepossession, opinion and authority. My fear is,

that what I shall deem it my duty to advance on these questions, may be regarded by the Court as a rash attempt to unsettle established doctrines, and, by some of the members of the Court, as an unwarrantable attack upon constitutional guaranties, in which they, with many other citizens, have a peculiar interest.

I ask, however, for a dispassionate hearing. If what I urge has not the sanction of reason and truth, let it be condemned: if it has, I trust it will prevail—I am sure it will ultimately prevail—whatever opinion and authority may stand in the way. Opinion and authority may stand for law, but do not always represent the law. There was a time, and a long time, when opinion and authority condemned as rash the doctrine that juries possess the right to determine, in libel cases, not merely the question of publishing, but the general question of libel or no libel; and yet the earlier advocates of the doctrine lived to see it established as law. So, for many years, opinion and authority sanctioned the doctrine that slaves might be held in England; but, after thorough investigation, this doctrine was overthrown, and that maxim, so fraught with important results, established, that slavery is strictly local, and cannot be extended beyond the territorial limits of the state allowing it.

Encouraged by these recollections, and assured of the disposition of the Court to ascertain and declare the law, whatever it may be, I shall proceed to state the facts out 6 of which the questions before the Court have arisen. I make this statement, partly from the abstract of the evidence contained in the report of the case by Mr. Justice McLean, and partly from my own notes and recollection, because it seems to me that a general knowledge of the facts of the transaction will conduce to a clearer understanding of questions of law.

The defendant, John Vanzandt, is an old man, of limited education and slender means, but distinguished by unquestioned integrity and benevolence of heart. He is a farmer, occupying a small property in the neighborhood of Cincinnati, and maintaining himself and family by the sale of its products in the markets of the city. On Saturday, the 23rd day of April, 1842, after attending the market as usual, he went out of the city to Walnut Hills, where he passed the night with a friend. The next morning, when he rose very early to go

home, he found in the road a company of negroes, consisting of a middle aged man, his wife, their children, the wife's mother, and two or three other persons,—nine in all. These persons, it appears, had escaped from slavery in Kentucky, and had been conducted, some twelve miles or more, from where they crossed the Ohio, to Walnut Hills. Vanzandt saw them for the first time in the road where he found them. He had nothing to do with their escape. But, upon their solicitation, or that of the person who had conducted them to Walnut Hills, he undertook to convey them in his wagon to Lebanon or Springborough, thirty or thirty-five miles northward from Cincinnati. There was no evidence that he had any positive knowledge that they were fugitives from slavery, or any information whatever on the subject, except what he derived from the 7 statements of the negroes themselves. He *believed,* doubtless, that they were fugitive slaves, but he had no notice whatever,—unless such intelligence as this be notice,—that the negroes had been held to service or labor in Kentucky under the laws thereof, and had escaped from that state into Ohio.

Under these circumstances he received them into his wagon, which was a covered vehicle of the kind commonly used by farmers attending the markets, and proceeded towards Springborough. One of them, a man named Andrew, took his seat in front, in open view, as the driver of the wagon.

They had travelled about fifteen miles in four hours, when their farther progress was arrested by two bold villains, who, without any legal process, without any authority or request from any claimant or any other person, in broad day, in open breach of the laws of Ohio, undertook to seize the blacks and carry them out of the state by force, on suspicion that they were fugitive slaves. In this daring and criminal attempt they were successful, except as to Andrew, the driver, who leaped from his seat, and escaped.

All the negroes had been the slaves of Wharton Jones, the plaintiff, and all of them, except Andrew, were recovered. He never returned.

Under these circumstances the plaintiff prosecuted two suits against Vanzandt: one in case, to recover the damages he had sustained by reason of the loss of Andrew, and the expenses of recapturing the others, and another in debt to recover the penalty of five hundred dollars given by the Act of 1793. The first of these actions is still pending in the Circuit Court: the second, which was 8 grounded upon alleged acts of the defendant in relation to Andrew ONLY, has been brought into this Court upon a certificate of division upon various questions, which arose during the progress of the trial, and, after verdict, upon a motion in arrest of judgment.

The questions, which arose during the progress of the trial and are certified for decision, are these:

1. Whether, under the 4th section of the act of 12th of February, 1793, respecting fugitives from justice and persons escaping from the service of their masters, on a charge for harboring and concealing a fugitive from labor, the notice must be in writing by the claimant or his agent, stating that such person is a fugitive from labor under the third section of the above act, and served on the person harboring or concealing such fugitive, to make him liable to the penalty of five hundred dollars under the act.

2. Whether such notice, if not in writing and served as aforesaid must be given verbally by the claimant or his agent to the Person who harbors or conceals the fugitive, or, whether to charge him under the statute, a general notice to the public in a newspaper is necessary.

3. Whether clear proof of the knowledge of the defendant by his own confession or otherwise, that he knew the colored person was a slave or fugitive from labor, though he may have acquired such knowledge from the slave himself, or otherwise, is not sufficient to charge him with notice.

4. Whether receiving the fugitive from labor at three o'clock in the morning, at a place in the State of Ohio, about twelve miles distant from the place in Kentucky, where the fugitive was held to labor, from a certain individual, and transporting him in a closely covered

wagon, twelve or fourteen miles, so that the boy thereby escaped pursuit, and his services were thereby lost to his master, is not a harboring or concealing of the fugitive within the statute.

5. Whether a transportation under the above circumstances, though the boy should be recaptured by his master, is not a harboring or concealing him within the statute.

6. Whether such a transportation of him in an open wagon, whereby the services of the boy were entirely lost to his master, is not a harboring or concealing of him within the statute.

7. Whether a claim of the fugitive from the person harboring or concealing him must precede or accompany the notice.

8. Whether any overt act, so marked in its character, as to show an intention to elude the vigilance of the master or his agent, and calculated to attain such an object, is a harboring of the fugitive within the statute.

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The questions upon the motion in arrest, are these:

1. Whether the first and second counts in the plaintiff's declaration contain the necessary averments that Andrew, the colored man, escaped from the State of Kentucky into the State of Ohio.

2. Whether said counts contain the necessary averment of notice that said Andrew was a fugitive from labor within the description of the act of Congress.

3. Whether the averment in said counts that the defendant harbored said Andrew are sufficient.

4. Whether said counts are otherwise sufficient.

5. Whether the act of Congress, approved February 12, 1793, be repugnant to the Constitution of the United States.

6. Whether said act be repugnant to the ordinance of Congress, adopted July, 1787, entitled “An Ordinance for the Government of the Territory of the United States northwest of the River Ohio.’

The declaration, upon which the plaintiff went to trial, contained four counts. The first charged the defendant with the offence of *harboring, detaining, concealing and keeping* Andrew, a fugitive from service; the second with the offence of *concealing* the fugitive; the third with the offence of *obstructing* the claimant in an attempt to arrest the fugitive; the fourth with the offence of *rescuing* the fugitive from the claimant after seizure.

The verdict of the jury was general; but, after its rendition and entry, and after a motion in arrest of judgment, an entry was allowed to be made upon the journal, that the plaintiff had abandoned the third and fourth counts before the cause was submitted to the jury. This entry was allowed upon the statement of the counsel for the plaintiff, that these counts were abandoned during the progress of the trial, though no application was made to the court to instruct the jury to disregard them.

The questions, now before the court in relation to the sufficiency of the declaration, arise, therefore, upon the first and second counts only. B

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These are as follows:

Wharton Jones, a citizen of and resident in Kentucky, by Charles Fox his attorney, complains of John Vanzandt a citizen of and resident in Ohio, who was summoned to answer unto the plaintiff in a plea of debt: for that whereas a certain person, to wit Andrew, aged about 30 years, Letta aged about 30 years, on the 23d day of May, 1842, at Boone

county, in the State of Kentucky, was the slave and in possession of the plaintiff, and his property; and owed service and was held to labor to the plaintiff by the laws of Kentucky; unlawfully, wrongfully and unjustly, without the licence or consent, and against the will of the plaintiff departed and went away from and out of the service of the plaintiff of said Boone county, and came w the defendant at Hamilton county, in the State and District of Ohio, and was there a fugitive from labor; and the defendant well knowing thai the said Andrew was the slave of the plaintiff and a fugitive from labor, yet afterwards, to wit, on the day and year aforesaid, at said District, contriving and unlawfully and unjustly intending to injure the plaintiff and to deprive him of said slave and his service; and of the profits, benefits and advantages that might and would otherwise have arisen and accrued to him from said slave and his service, did then and there knowingly and willingly, wrongfully, unjustly and unlawfully receive the said slave of the plaintiff into his service; and knowingly and willingly harbor, detain and conceal and keep the said slave, in consequence of which the plaintiff lost said slave and was deprived of his services and of all benefits, profits and advantages which might and would have accrued and arisen to him from such slave and his service, contrary to the statute of the United States, in such case made and provided, whereby the defendant forfeited the sum of five hundred dollars to and for the use of the plaintiff; yet the defendant, though often requested, has not paid the same nor any part thereof:

And, also, for that whereas, on the day and year aforesaid, at said Boone county, a certain person, to wit, Andrew, aged about 30 years, was the slave of and in the possession of the plaintiff and his property, and owed service and was held to labor to the plaintiff by the laws of the State of Kentucky, did unlawfully, wrongfully, and unjustly without the license or consent and against the will of the plaintiff, depart and go away from and out of his service, to wit, at Boone county aforesaid, and came to Hamilton county in the State and District of Ohio. to the defendant, and the defendant had notice that the said Andrew was the slave of the plaintiff and a fugitive from labor; yet afterwards, to wit, on the day and year aforesaid at the District aforesaid, contriving and wrongfully and unjustly intending

to injure the plaintiff and deprive him of the said slave and his service, then and there on the day and year aforesaid, at the District aforesaid, knowingly and willingly, unjustly, wrongfully and unlawfully conceal the said slave from the plaintiff, in consequence of which the plaintiff lost said slave and was deprived of his service and of all profits, benefits and advantages which might and otherwise would have arisen and accrued to the plaintiff from such slave and his service, contrary to the statute of the United States in such case made and provided, whereby the defendant forfeited 11 the sum of five hundred dollars to and for the use of the plaintiff, yet though often requested he has not paid the same nor any part thereof, to the damage of the plaintiff in the sum of Five Hundred Dollars, and therefore, &c.

The claim of the plaintiff, made in this declaration, rests wholly upon the act of Congress of 1793. I therefore quote the third and fourth sections, which alone touch upon the matters in controversy.

“§ 3. Be it enacted, That when a person, held to labor in any of the United States, or in either of the territories on the north-west or south of the river Ohio, under the laws thereof, shall escape into any other of the said states or territory, the person to whom such labor or service may be due, his agent or attorney, is hereby empowered to seize or arrest such fugitive from labor, and to take him or her before any judge of the circuit or district courts of the United States, residing or being within the state, or before any magistrate of a county, city, or town corporate, wherein such arrest or seizure shall be made; and, upon proof to the satisfaction of such judge or magistrate, either by oral testimony, or affidavit taken before and certified by a magistrate of any such state or territory, that the person so seized or arrested doth, under the laws of the state or territory from which he or she fled, owe service or labor to the person claiming him or her, it shall be the duty of such judge or magistrate to give a certificate thereof to such claimant, his agent or attorney, which shall be a sufficient warrant for removing the said fugitive from labor to the state or territory from which he or she fled.

“§ 4. That any person who shall knowingly and willingly obstruct or hinder such claimant, his agent or attorney, in so seizing or arresting such fugitive from labor, or shall rescue such fugitive from such claimant, his agent or attorney, when so arrested pursuant to the authority herein given or declared, or shall harbor or conceal such person, after notice that he or she was a fugitive from labor as aforesaid, shall for either of the said offences, forfeit and pay the sum of five hundred dollars; which penalty may be recovered by and for the benefit of such claimant, by action of debt, in any court proper to try the same; saving, moreover, to the person claiming such labor or service, his right of action for or on account of the said injuries or either of them.”

These legislative provisions were designed to give effect to the last clause of the second section of the fourth article of the Constitution of the United States, which is in these words:

“No Person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged 12 from such service or labor, but shall be delivered up on claim of the party to whom such labor or service may be due.”

Having thus stated the questions certified for decision, and having recited so much of the record and of the law and constitution as seems necessary to a clear understanding of them, I shall proceed, at once, to the discussion before me, again earnestly invoking the patient and deliberate attention of the Court.

It would be as useless, as it would be tedious, to take up and examine the questions one by one in the order in which they are presented by the record. Upon the first, in my judgment, no difference of opinion can exist. No one, I think, would contend that a *written* notice from the claimant of a fugitive from service is essential to the offence of harboring or concealing as defined by the statute. Several of the questions, also, present the same

point, in different phrases and with varied circumstances, and an argument upon each of these is manifestly needless.

I shall adopt, therefore, the order of investigation which seems to me best adapted to a perspicuous exhibition of the true merits of the controversy. I shall enquire:

1. Whether the plaintiff's declaration be sufficient; and, under this head, what are the requisites of notice under the act of 1793?

2. What acts constitute the offence of harboring or concealing under the statute?

3. Whether the act of 1793 be consistent with the provisions of the Ordinance of July 13, 1787?

4. Whether the act of 1793 be not repugnant to the Constitution of the United States?

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I have no doubt that both first and second counts of the plaintiff's declaration—the only counts now open to investigation—are insufficient.

It has never been controverted, that the provisions of the act of 1793, denouncing the penalty claimed by the plaintiff, is penal in its character. The declaration charges the defendant with an offence under this act, and demands the penalty. It is a penal action under a penal statute; and he who seeks a penalty, in addition to the damage he has actually sustained, is entitled to no favor in a Court of Justice. The act, under which he claims, must be strictly construed: and the declaration, by which he claims, must present a case within the precise terms of the act. No matter what injury may be suffered by the claimant of a fugitive servant, in consequence of the acts of a third person, if those acts do not make the very case described by the law, or if he does not state in his declaration, with strict certainty, the facts which make that case, he must resort to such remedies as the

common law, or other provisions afford him. He cannot be heard to demand the penalties given by the act.

It may be said that the act gives a remedy, as well as denounces a penalty, and must therefore be construed as a remedial law. The answer is,—if it be admitted that the last clause of the act is remedial in its character,—that the rule is well settled, that where an act is remedial in one provision and penal in another, that the penal provision is to be construed strictly, while the remedial provision may be construed liberally.1 And there is no case to be found where a provision of an act which imposes

1 *Dwarris on Statute,* 754; *Short* v. *Hubbard,* 9 *Eng. Com. Law.* 431.

14 a penalty has been construed otherwise than strictly, with whatever other provisions it may stand associated. There is no more reason for construing a penal provision liberally, because it is preceded or followed by a remedial provision, than may be urged for construing a penal act liberally, because other acts on the same subject matter, in the same statute book, are remedial in their nature.

To array authority on points like these may seem vain parade; but I deem it my duty, in this case, to risk. the imputation, rather than hazard, by possibility, the cause committed to my defence.

A penal statute, as defined by Mr. Dwarris, is a legislative act, “whereby a forfeiture is inflicted for transgressing the provision therein contained,”1 Such a law, we are assured by the same author, “must receive a strict construction. It cannot be extended by construction. —The law does not allow of constructive offences or of arbitrary punishments. *No man incurs a* PENALTY, *unless the act, which subjects him to it, is* CLEARLY *within the* SPIRIT AND THE LETTER *of the statute imposing such penalty.* ” “If these rules are violated, the fate of accused persons is decided by the arbitrary caprice of judges and not by the express authority of the laws.”2 And these rules are said to be “of that higher sort of maxims, that as regulae rationales, and not *positivœ,* and the law will rather *endure a*

particular offence to escape without punishment than violate such a rule."3 These rules, indeed, are essential to the very existence of a free government; for there can be no substantial freedom, no true security

1 *Dwarris,* 736, 7.

2 Per Best, C. J., *Fletcher* v. *Lord Sondes,* 3 *Bing.* 580.

3 *Dwarris on Statutes,* 736.

15 where the citizen is liable to be deprived, under penal laws, of life, liberty or property, in any case where the offence is not brought, by allegation and proof, strictly within the terms used by the Legislature in the definition or description of it.

And these rules have received the fullest sanction from the writings of American Jurists and the decisions of American Courts.

"To recover a penalty on a statute," says Mr Dane, in his valuable Abridgment of American Law, "the *express mode,* therein named, must be adopted and pursued, for the statute gives the right, and *it is penal,* and must be *strictly* adhered to."1

1 5, Dane, 244, § 8: 6 *Dane.* 588, § 16. I am happy to find my position confirmed by one of the learned Counsel for the plaintiff in this case. Mr. Morehead, in an able essay published in the Western Law Journal, V. 4, p. 111, says: "I have supposed it to be a maxim of UNIVERSAL acceptation, that penal statutes shall be *construed strictly;* that is to say, that they shall have a LITERAL construction; and I can perceive no just reason why such a construction should not be applied to the Constitution of the United States, in cases of trials for capital offences."

In a case where the statute subjected the "sheriff or officer," to whom an execution was " *directed* " to the payment of the debt and costs, and thirty per cent. damages, for failure to return the writ, and judgment had been rendered against a deputy sheriff for such

a failure, the Court of Appeals of Kentucky reversed the judgment, on the ground that executions were always " *directed* " to the " *sheriff,* " and therefore, a deputy sheriff could not be made liable. The Court said, "The act is certainly of a highly penal character, and, consequently, in deciding upon cases attempted to be brought within its operation, *no liberality of construction ought to be indulged.* Observing a strict construction, therefore, and deciding according to the LITERAL IMPORT of the act, we 16 can have but little hesitation in affirming that the motion against the deputy sheriff cannot be sustained."1

1 *Caldwell* v. *Holley.* 1 *A. K. Marsh,* 429.

In a later case, under a statute which prohibited the keeping of gaming tables, at which any game of chance should be "played for money or any other thing,"2 a person was indicted for keeping such a table, at which the game of faro was played for " *money,* " and the proof was that the money played for was bank notes, and the defendant was convicted. The Court of Appeals, however, reversed the judgment, on the ground that, in penal actions, the charge must be proved as laid, and proof of play for *bank notes* was not proof of play for *money.* The Court said: "Though the betting of bank notes is *equally illegal,* and would render the defendant liable to the same penalty as the betting of money, yet, *as the proof must fit the charge laid,* the charge was not made out in this case.3

2 2 *Statutes of Kentucky,* 756.

3 *Pryer* v. *Commonwealth,* 2 *Dana,* 298.

In another case the same Court reversed a judgment for a fine and treble tax, and said: "The proceedings are variant from the mode prescribed by the law; which being penal must be strictly and literally pursued."4

4 *McCall* v. *Clark County Court,* 1 *Bibb,* 516.

Under a statute of Maryland, any person who gives a pass, assists by loan or otherwise, the transporting of slaves out of the State, or unlawfully otherwise deprives a master of his slave, is subjected to a fine, and also to a civil suit for damages. Under the penal provision of this act, judgment for the penalty was rendered in an inferior Court, upon an indictment which contained no allegation that the slave was lost to the master in consequence of 17 the defendant's acts. The case of the defendant was presented to the Court of Appeals by Mr. Chief Justice Taney, then at the bar, and the judgment was reversed for the omission of the allegation of loss of service.1

1 6 *Harr. & Johns.* 10.

In Tennessee, forging is defined by statute to be the “fraudulent making or alteration of a writing to the prejudice of another's right;” and it was held by the Supreme Court that fraudulently writing a certificate of freedom and delivering the same to a slave is not forging within that definition; because such an instrument, being void, can prove nothing if offered in evidence, and therefore is not to the legal prejudice of a third party. The opinion of the court was delivered by Mr. Justice Catron, then Chief Justice of Tennessee, who remarked in conclusion, “much as we may regret the want of power to punish the defendant on this instrument, still we think he is clearly not subject to the penalties of felony, and the judgment must be arrested.”2

2 *State* v. *Smith,* 8 *Yerg.* 150.

In Alabama, also, it has been repeatedly held that an indictment, framed on a statute, must conform strictly to the words of the statute. Where an indictment for stealing slaves, omitted the allegation that they were *stolen from or out of the possession of the master or overseer* it was held bad by the Supreme Court.3 It was not enough that stealing from the possession of any other than the master or overseer wrought the mischief intended to be prevented. It was not enough that the words “from or out of,” might, by a slight accommodation, be held to mean in possession or out of possession. The court would not

inflict a penalty unless the act was within the terms of the prohibition, nor, of two possible interpretations, C

3 *State* v. *Brown,* 4 *Port.* 412.

18 adopt that which would operate most stringently against the accused. In another case, upon the same principles, the same court held that an indictment for stealing a slave could not be supported by proof that the defendant aided the slave to escape.1

1 8 *Port,* 412.

And this court has declared that “the rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the Legislature not the Court which is to define a crime and ordain its punishment.”2

2 *United States* v. *Wiltberger,* 4 *Pet. Cond. Rep.* 589

And not only is it universally true that penal laws shall be construed strictly, and shall not be extended by construction, and that, in penal actions, the declaration must follow the statute and state a case precisely within its terms; but in every such action the declaration must aver that the offence alleged was committed *contra formam statuti,* or against the provisions of the statute. The authorities to this point are full and inflexible.3

3 *Chitty on Plead.* 404, 5, 6; 1 *Gallison's Rep.* 259 & 265, 6.

It is no small satisfaction to me to find that the rule in relation to penal statutes, and declarations in penal actions, which I have endeavored to establish has been applied in the construction of the very statute now under consideration, in an action for same penalty which the plaintiff in this case seeks to recover. In the case of *Simmons, Ex parte,* 4 Mr.

Justice Washington declared that the constitution and the law relating to fugitives from service are not susceptible of *a construction broader than the language*

4 4 *Wash.* 397.

19 *used.* And in the case of *Hill* v. *Low,* 1 which came before him on writ of error, prosecuted to reverse a judgment given for the penalty imposed by the act of 1793, the same learned judge held that obstruction, hindrance, or interruption, is no offence under the act of Congress unless it be interposed previous to or whilst the claimant or his agent is in the act of seizing or arresting the fugitive, or is endeavoring to make such seizure. After the arrest is consummated, “no subsequent obstruction, whilst the custody continues, although it should afford an opportunity for an escape or be a restraint upon the free will of the claimant, can constitute the offence of obstruction, or hindrance mentioned in the fourth section of the act.” So, exciting or advising a person, arrested as a fugitive from service, to fly, if no actual force or intimidation be employed to deliver him from custody, cannot constitute a rescue. But obstruction or hindrance, of the claimant or his agent, with force or by intimidation, for the purpose of enabling the fugitive to escape, in consequence of which the fugitive does escape, is a rescue. So all interposition or resistance to the claimant or his agents in attempting to recapture the fugitive after the original arrest and an escape is an obstruction or hindrance.

1 4 *Wash.* 328.

The reason for these distinctions is plain. Obstruction or hindrance of the claimant or his agent, in *seizing* the fugitive, is within the terms of the act. Obstruction or hindrance of the claimant in *holding* the fugitive, after seizure, is not within the terms of the act, and cannot be brought within them except by construction,which cannot be allowed. The obstruction or hindrance last described, if it be intended to aid and actually causes the escape of 20 the fugitive, will amount to a rescue; but if the claimant wishes to recover the penalty imposed by the act in such a case, he must, in his declaration, state a case of rescue, and not a case of obstruction or hindrance. Exciting or advising a slave to fly after arrest, is not a

rescue; because a rescue is “a *forcible* setting at liberty;”1 and there can be no rescue without force. Exciting or advising flight, therefore, though of precisely the same mischief as rescue, will not subject the offending party to the penalty of the act, but the party injured must be left to his action for damages.

1 1 *Russ. on Crimes,* 338.

The same rule is applied by the same learned judge in determining *what fugitives* are described by the Constitution and the law. He says, the act of Congress “relates to fugitives from one State to another. The words of the law are ‘when any person held to labor in any of the United States * * under any of the laws thereof, shall escape into any other of the said States, * * the claimant or his agent may *seize such fugitive from labor,* ’ and upon proof, * * that the person so seized under the laws of the State ‘from which he *fled* ’ owes service, * * it is made the duty of the judge to grant the certificate. The second section of the fourth article of the Constitution of the United States is *confined* to persons held to service or labor in one State under the laws thereof, escaping into another.”2

2 *Simmons, Exparte,* 4 *Wash.* 392.

The persons entitled to exercise the right of recapture, are described with no less precision by the Constitution and the law; and it is equally inadmissible to extend that right by construction to any other persons than those thus described. “The party to whom such labor or service may be due,” is the description of the Constitution. 21 “The person to whom such labor or service may be due, his agent or attorney,” is the description of the law. Accordingly Mr. Chief Justice Taney, speaking of the act of Congress, in the *Prigg* case, said, “By that law the power to seize is given to no one, but the owner, his agent or attorney.”1

1 16 *Peters,* 632.

May I not now safely claim the following points as firmly established?

1. That the provision of the act of 1793, imposing a penalty for certain offences is a penal law.

2. That a statute imposing a penalty must be strictly construed, and can never be extended by construction so as to embrace any other offences, than those precisely described in it.

3. That a declaration under such a statute, must state the offence, if not in the very language of the statute, yet in terms which describe the offence with completeness and precision.

4. That a declaration under such a statute must aver in terms, that the offence was committed *contra formam statuti,* or against the provisions of the statute, before the plaintiff can claim that an action has accrued to him for the penalty.

Let the declaration in the record be examined by these tests. What is essential to such a declaration is quite plain. It must state a case which entitles the plaintiff to the penalty imposed by the act upon the harborer of the fugitive from service. It must state, then, that a person held to service or labor by the plaintiff in Kentucky, under the laws thereof, has escaped into Ohio. The person escaping must be named, or sufficiently described; 22 for the plaintiff necessarily knows what servant has escaped, and the defendant has a right to be fully advised of the charge he is to answer, and he cannot be so advised unless the declaration name or describe the fugitive whom he is alleged to have harbored. The declaration must allege, also, that the defendant harbored the fugitive after notice that he had been held to service or labor in the State of Kentucky under the laws thereof, and had escaped thence into the State of Ohio.

Do the averments of the plaintiff's declaration satisfy these requisitions? Let us examine it.

The Court will not fail to notice, that the declaration is not drawn in conformity with any approved precedent of a declaration in debt for a penalty. The whole statement of both counts is taken, with slight modifications, from a form in Chitty for a declaration in case for

damages occasioned to the plaintiff by harboring the plaintiff's servant.1 The conclusion, which is wholly informal, seems to have been intended by the pleader, as a conclusion in debt Not much accuracy is to be expected in a declaration so framed, and not much is to be found.

1 2 *Chitty on Plead.* 646.

The first count commences by stating, that a certain person, to wit, “Andrew, aged about thirty years, Letta, aged about thirty years, was the slave * * of the plaintiff,” &c. There is nothing to show to which of these two persons, Andrew or Letta, the allegation of escape is intended to apply. It is, obviously, not intended to apply to both, for it refers only to a single person. If applied to one or the other, in the alternative, the count is then clearly bad for uncertainty; and if it be left undetermined to which of the two it properly applies, then 23 the count is, also, bad for the same reason. It may be held, that this uncertainty is cured by the verdict which has been rendered in this case, and I refer to it mainly for the purpose of directing attention to the carelessness with which the declaration is drawn.

The next objection to the first count is, I must think, fatal. After alleging that the fugitive, “at Boone County, in the state of Kentucky, * * owed service and was held to labor to the plaintiff by the laws of the State of Kentucky,” the count proceeds thus: “unlawfully, wrongfully, * * without the licence or consent, and against the will of the plaintiff, departed and went away from and out of the service of the plaintiff of said Boone County, and came to the defendant at Hamilton County, in the State and District of Ohio.” The object of the allegation, it would seem, was to state that the servant escaped from the *plaintiff* to the *defendant,* and the county of the plaintiff, and the county and state of the defendant, are mentioned only as their respective places of residence. But has the pleader, in fact, although accidentally, stated an escape within the meaning of the act of Congress? The clause of the constitution relating to fugitives from service,—and the act cannot enlarge, and does not profess to enlarge, the constitution,—is “ *confined* to persons held to service or labor in one state and escaping to another.”1 The constitution and the law apply, and

were intended to apply, to this single class of persons only. Does this declaration, then, aver that the servant in question escaped from the state in which he was held to service into another state. The allegation is, that "—departed and went away,"—and I will admit that these

1 Per Washington, J., 4 *Wash.* 396.

24 words as used in the declaration may be considered as equivalent, in import, to the word escaped,— *from the service* of the plaintiff *of* said Boone County, and came to the defendant *at* Hamilton County in the State of Ohio." There is no allegation, even, that *any body* escaped, for the verbs "departed and went away," have no nominative. But admit—what can be admitted no otherwise than for the sake of argument,—that a nominative may be supplied by intendment, it remains clear that every fact alleged may be truly stated, and yet no escape such as the constitution and the law contemplate, may have taken place.

Under what law was the fugitive held? A certain person, it is alleged, was the slave of the plaintiff at Boone County in the state of Kentucky, and owed service to the plaintiff by the laws of Kentucky, not of the state of Kentucky, but of Kentucky. And let me ask, if this allegation respected New York, would it be held sufficient, when the word New York might be taken to describe the city as well as the state? And if not, can the allegation in the count before us be held sufficient? May it not be true, and yet may not the servant have been held under other laws than those of the state of Kentucky?

But, dismissing this point, let me present a more serious one. Certainly the allegation that the servant departed from his master's service without his consent, and came to the defendant in Ohio, is not an averment of the escape contemplated by this act. This allegation may be true, and yet the master, though *of* Boone County, may have been in Ohio, with the servant, at the time of the escape; or the servant may have departed from his service in Boone County without his consent, and afterwards 25 may have been licenced to come into Ohio.—And, if this be so, this count in the declaration states no title to the penalty.

It will not do to say, that the language used may be applied, by a liberal construction, to the case of an escape from the state of Kentucky into the state of Ohio. We have nothing to do with liberal construction in penal actions. The numerous authorities I have already cited establish beyond a question, that the law will not endure a liberal construction in favor of him who claims a penalty. He must state and prove the precise case in which the law inflicts the penalty, or he cannot recover it by the judgment of a court.1

1 It seems idle to cite further authorities, but *McKeon* v. *Lane,* 1 *Hall, N. Y,* 318, and *Bigelow* v. *Johnson,* 13 *John.* 438, are cases in point.

The plaintiff, in this case, is bound to aver and prove, that the alleged fugitive was held to service or labor in the state of Kentucky under the laws thereof, and escaped from that state into Ohio. Has he averred such an escape? Is departing and going away from a citizen of Boone County in Kentucky, and subsequently coming to a man in Ohio, necessarily an escape from the state of Kentucky into the state of Ohio? May not both these facts exist, in a great variety of cases, in which there is no escape from one state into the other? If to escape from one state into another were an offence, punishable by indictment, could an indictment, couched in the terms used in this declaration, be sustained for a moment? These questions, it seems to me, admit of but one answer. No proposition is clearer, to my mind, than that whatever else this declaration may assert, it contains no averment of an escape from the state of Kentucky into the state of Ohio. D

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It is urged in the printed argument for the plaintiff, that, after verdict, it will be presumed that the facts necessary to obtain it, although not specifically alleged, were proved, and the declaration will be sustained.—But there is no such rule as this, and none such can ever be established. An omission to state facts, which are *implied in,* or *inferrible from,* the facts averred and found, will be aided by the verdict: because the verdict establishes the truth of the facts averred, and the truth of the facts not averred is a necessary inference from the truth of the facts found. But proof of facts, not necessarily implied by the facts

stated, will not be presumed. The rule is laid down with precision, by Buller, J., in *Speirs* v. *Parker:* 1 “After verdict nothing is to be presumed but what is expressly stated in the declaration, or what is necessarily implied from the facts which are stated.” The question in *Speirs* v. *Parker,* like that now under consideration, arose after verdict in an action of debt for penalties. The ground of the motion in arrest was, that the declaration did not sufficiently negative an exception in the act giving the penalty. The opinion of the whole court was, that the plaintiff, having insufficiently negatived the exception, had failed to aver a title to the penalty, and judgment was arrested. The same rule has been frequently applied in other cases,2 and is very ably stated and illustrated by Mr. Gould, in his work on Pleading.3 And this Court has also recognized

1 1 *T. R.* 146.

2 *Rushton* v. *Aspinall,* 2 *Doug.* 683; *Bartlett* v. *Crozier,* 17 *J. R.* 453; *Williams* v. *Hingham.* 4 *Pick* 344, which contains a very clear and able statement and application of the rule; *Bishop* v. *Hayward,* 4 *T. R.* 471. In the last case, Lord Kenyon says: “It is an invariable rule that every plaintiff must, on his own stating of the case, show sufficient to entitle him to recover judgment against the defendant.”

3 *Gould on Pleading,* 503.

27 the rule, and applied it to a case of a defective plea. “Defects in substance are not cured by verdict, ‘for this,’ says Bacon, ‘would have ruined all proceedings in courts of justice,’ and a defect in substance, in a plea or verdict, is conceded in all the books to exist when they do not cover whatever is essential to the gist of the action.”1

1 *Garland* v. *Davis,* 4 *How,* 155.

In the case before the Court the declaration avers certain facts. The issue is *not guilty.* Of what?—Doubtless, of the facts charged. The issue cannot be broader than the charge, and if no offence be charged, there can be no penalty. The verdict is “ *guilty.* ” Of what? Of harboring and concealing certain persons alleged to have been held to service by

the laws of Kentucky, who, without consent, departed from the service of the plaintiff of Boone County, and, afterwards, came to the defendant in Ohio. These facts, I have already shown, do not make the case of escape defined by the constitution and the act of Congress: for they may all be true and yet no escape have taken place from one state into another. Nor can the necessary averment be supplied by intendment. This would not be allowed in an ordinary action, much less in an action for a penalty. With great deference, then, I submit that the position that the first count of the declaration in respect to the averment of escape is fatally defective, is fully established.

The second count is equally defective in the same particular. The allegation of escape is exactly the same in both counts, except that in the second instead of avering, as in the first count, that the servant “went away from the service of the plaintiff of said Boone County,” 28 the pleader states that the servant “went away from the plaintiff's service, *to wit,* at Boone County aforesaid.” The allegation is of escape from the plaintiff's service, and his residence is laid under a videlicet, so that if the proof should show that he resided in some other county, there would be no variance. There is no allegation of escape from the state. And, I repeat, that a declaration upon a penal statute must describe, with strict certainty, sufficient facts to constitute the offence;1 and of these facts, in this case, an escape from the state of Kentucky into the state of Ohio, is one that cannot be dispensed with.

1 *Fairbacks* v. *Antrim,* 2 *N. H.* 105. Mr. Justice Woodbury, in this case, held “the strictest certainty.” The Court seems to have been disposed to relax the rule as to the construction of statutes, but upheld it fully as to declarations for penalties.

I submit, further, that the first count in the declaration contains no sufficient averment of notice to the defendant, that the person harbored was held to labor in the State of Kentucky, under the laws thereof, and had escaped from that State into Ohio. The averment is, that “the defendant, well knowing that said Andrew was the slave of the plaintiff, and a fugitive from labor, afterwards * * did, knowingly and willingly, harbor, detain, conceal and keep the said slave.” The act of Congress provides that “any person

who shall *knowingly and willingly* * * * harbor or conceal *such* person, *after notice* that he or she was a fugitive from labor *as aforesaid,* shall, * * forfeit and pay the sum of five hundred dollars."

The question is, does the declaration aver that the defendant " *after notice* " that the servant "was a fugitive from labor *as aforesaid,* " harbored or concealed him?

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That no such averment is made in terms is certain; but if the declaration makes the averment in words of the *same* import, it will be sufficient. Are the terms of the declaration of the same import as the words of the law?

1. Is knowledge, or belief, notice?

2. Is notice that the person harbored is 'a slave, and a fugitive from labor,' equivalent to notice that he was held to labor under the laws of a state, and has escaped from that state into the state where he is harbored?

The learned judge who presided at the trial of this case, in the Circuit Court, expressed the opinion, in the case for damages between the same parties, that "the law of notice most appropriate to the case in hand," is that "which applies to a purchaser of real estate for a valuable consideration with notice." Whatever may be said as to the correctness of this opinion, as applied to an action for damages—and I cannot but think that the error of it even when so applied, will be apparent upon reconsideration—can there be a doubt that, in an action for the penalty, a very different notice from that which will affect a purchaser, must be averred and proved? The learned judge cites, in support of his view, the language of Mr. Justice Story, in a case reported by Gallison. "It is a general rule, that whatever is sufficient to put the parties upon inquiry is good notice;" * * and "notice of the facts" is "notice of the legal consequences flowing from the facts."1 Judge Story referred to the notice necessary to charge a purchaser with knowledge of prior rights, and, in that case, a sale was set aside in favor of a party having a prior right, because

1 *Brig Ploughboy,* 1 *Gall.* 42.

30 cause the circumstances were such as would put a prudent man upon enquiry. But to apply such a rule in the construction of a penal statute, and to say that whatever is sufficient to put a party upon enquiry is such notice as the act requires, in order to charge him with a penalty, seems to me wholly unreasonable and indefensible.

The act of Congress plainly contemplates a very different kind of notice. In fact, the words “after notice” are wholly superfluous, upon the hypothesis that notice is knowledge. The act provides that if any person shall *knowingly* and *willingly* harbor or conceal *such* person, *after notice,* &c. Erase the words “after notice,” and is not knowledge still essential to the offence of harboring? Must not the claimant of the penalty, before he can entitle himself to a recovery, aver and prove that the harborer knew that the person harbored was a fugitive from labor, who had been held to service in one state under its laws, and had escaped into another? The words “ *knowingly and willingly* ” qualify the words “ *harbor or conceal,* ” as much as they do the words “ *obstruct or hinder,* ” or the word “ *rescue;* ” and the words “ *such* person” mean such a fugitive servant as is described in the preceding section of the act. I think there can be no doubt as to this. If then the act had never contained the words “after notice,” &c., the averment of knowledge would, nevertheless, have been necessary. Let it be supposed that the act did not originally contain these words, and that they were subsequently introduced by amendment, can it be maintained that the introduction of them would have had no effect upon the construction of the act? If, then, these words are not merely tautological, they must mean something different from knowledge.

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But it may be argued that the words “knowingly and willingly” do not qualify the words “harbor or conceal.” Let this be granted for the sake of the argument. These words, however, do qualify the terms “obstruct or hinder.” Whatever else may be controverted, this cannot be. Why, then, are the words “after notice” used to qualify the act of harboring, while the words “knowingly and willingly are employed to qualify the act of obstruction?

The difference in language marks the difference of sense. The Legislature did not intend that mere receiving or sheltering a fugitive servant, should subject the citizen to a penalty, without actual notice from the claimant, or some one acting for him, that the person so received, was such a fugitive as is described in the constitution and the law. Such, certainly is the plain obvious meaning of the language used; and I cannot think that this court, in order to bring a case within the provisions of a penal statute, will apply to the statute the enlarged rules, as to notice, which prevail in courts of equity.

Nor can I be persuaded that the Legislature intended words “after notice,” as the mere equivalent of “knowing.” The whole object of the statute is to provide *for the enforcement of claims,* to the persons of fugitive servants. It supposes, first, the case of an escape, and defines it with rigorous precision. It then brings forward the claimant; authorizes the seisure; and provides for the enforcement of the claim. It next provides penalties against those who do certain acts in prejudice of the claim so made. Throughout, it supposes a claim, and a claimant or his agent, prosecuting it. When the claimant is at hand, seizing or endeavoring to seize the fugitive, knowingly and willingly obstructing or hindering the arrest, or rescuing the servant, after the requisite notice, will subject 32 the obstructors or rescuers to the penalty. But harboring or concealment is a distinct offence. It is supposed to be committed always under circumstances, which do not amount to obstruction or hindrance. It cannot be committed, unless there be a fugitive; nor, unless there be a claimant. There must be a subject of the act, answering the description of the law, and the act must be to the prejudice of an asserted right. He does not commit the offence intended by the act, who receives into his house, and employs in his service a fugitive servant, whom his master does not reclaim, and has no thought of reclaiming; although, he may know the man to be an escaping servant, within the description of the law. Harboring or concealment only becomes unlawful, after notice,—whether by writing or verbally, or by newspaper publication, or in any similar mode, it matters not—and this notice must be information communicated, in some way, by the claimant or some one for him, to the party

to be charged. After such notice the harboring will become unlawful, though the claimant may not be in immediate pursuit of the servant.

The act, it seems to me, contemplates a claim and a claimant, throughout; and to provide in the fourth section for three distinct classes of injuries, under three distinct sets of circumstances.

1. Where the claimant in person, or by his agent, is in pursuit of a fugitive servant, answering the description in the act, and any person, knowingly and willingly, whether by harboring, concealment, resistance or otherwise, undertakes to prevent the arrest, after the notice required by the act; this is obstruction or hindrance.

2. Where the claimant has arrested such servant and any person, knowingly and willingly, and with force, sets him at liberty, after such notice: this is rescue.

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3. When any person, having received or not having received such a servant into his employment, or having given or not having given him shelter and entertainment, knowingly and willingly, fraudulently conceals him, after such notice: this is harboring or concealment.

In each case the act must be knowingly and willingly done, and it must be done also after notice. In the case of obstruction or hindrance, and in the case of rescue, notice is easily given, for the claimant or his agent is on the spot. In the case of harboring or concealment, the claimant or his agent may or may not be in pursuit; but the offence cannot be complete until after notice.

It may be said that the words “after notice” have no connection with “obstruct or hinder” or with “rescue.” I think the true construction of the act is otherwise; but I am willing to accept the construction suggested. It makes the defendant's case still stronger. It asserts, in fact, that while knowledge and purpose are sufficient to constitute the first two offences, notice, as distinguished from knowledge, is essential to complete the third.

I have defined harboring as fraudulent concealment, because this seems to me the probable sense in which the Legislature used the word. To me the words “harbor or conceal” seem to be used in the act as equivalent terms, descriptive of the same offence: just as the words “obstruct or hinder,” “seize or arrest,” “agent or attorney” are used, not to convey different ideas, but make the meaning of the legislature more distinct.

And the definition of harboring as given in the books sanctions mine. The Supreme Court of North Carolina has declared harboring to be “fraudulent concealment.”1 Under the statute of that state, employing or maintaining E

1 *Dark* v. *Marsh,* 2 *N. C. Law Rep.* 249.

34 openly is not harboring. And Mr. Bouvier in his Law Dictionary,—I do not find the word in Cowel, or Jacob, or Tomlins,—says: “To harbor is to receive, clandestinely and without lawful authority, a person, for the purpose of concealing him so that another, having the right to the lawful custody of such person, shall be deprived of the same.”2

But it is unimportant to this argument whether harboring and concealment be considered as the same offence, or as two distinct offences. It is equally unimportant whether the harboring be fraudulent concealment, or simple sheltering, entertaining or lodging.

In whatever sense the word be taken, actual notice is equally essential; and it must be the precise notice which the statute requires. Before, or during the harboring or concealment, the party to be charged under the act must be *notified* by the claimant, or some one acting for him, that the person claimed is a fugitive within its description. The offence of harboring, however defined,—and with this offence alone am I, in this argument, concerned,—cannot be complete until after notice.

Even at common law, according to the latest authority, no action will lie for harboring the servant of another, until after notice, that he is such servant, accompanied by a demand for restoration, or at least, some assertion of the prior right. Mr. Chitty states the law thus:

“In case an apprentice or servant, or a mere journeyman hired for an unexpired term, or to complete some unfinished work, absents himself, then, to fix any third person with liability to an action for continuing to harbor him,

2 1 *Bouvier,* 460.

35 he must receive a general or particular notice of the circumstances. For although, *if he took, or enticed the party away,* he would be immediately liable to an action without previous notice; yet a notice must precede any suit, for merely detaining or harboring.”1 The same author, in another part of his work, speaking of the harboring of an apprentice or servant, says: “it will be necessary to be prepared to prove a formal demand of restoration before an action can be sustained, and that it has been so made as to constitute the party a wilful wrong doer, unless the plaintiff can prove an original enticing away.”2 Mr. Starkie, also lays down, the same rule.3 I am aware that these rules have not always been applied to actions at common law, but I submit that they are entirely reasonable and just and fit, especially in a country like ours, to be so applied in all cases. The law should never presume against liberty. It should never presume an intention on the part of the master to pursue and reclaim an escaping servant. It should never presume an act of humanity or charity to be an offence.

1 1 *Chitty's Gen. Prac.* 449,

2 *Id.* 465,

3 3 *Starkie on Ev.* 1310.

But, however this may be at common law, can there be a reasonable doubt, that such must be the rule, under the act of 1793? That act is not only in derogation of the common law, but it is, also, intended to enable the claimant to enforce a right created by the law of his state, extra-territorially, in states, where that right cannot exist, except as an abridgement of their sovereignty and fundamental law, and in virtue of the constitution and the act. There is, therefore, far more reason for requiring notice, from the claimant to the

party to be charged, under this act, than in a case at common law; and it seems to me, that the reasons I have adduced, establish, 36 beyond reasonable question, that it was the intention of the Legislature to require such notice.

It is pertinent to add, that in many cases, the masters of servants, and especially of slaves, never set up any claim to them, if they escape. Every one, at all acquainted in the slave states, knows such masters. It will be hardly contended, that receiving, employing, sheltering or entertaining escaping servants, not pursued and not claimed, is a penal offence; and the fact that there are many such cases of escape, strongly confirms the view I have submitted, as to the sense in which the words “after notice” are used in the act.

It may be said, that, upon this construction of the act, the right of masters to reclaim their escaping servants may be invaded by acts, which will not subject the doers of them to any penalty. This may be admitted: but the terms of the act must not be extended, and penalties multiplied, by construction. For all injuries, not defined by the act, parties must be left to the redress afforded by the common law. Thus Judge Washington held, that interference and opposition, however vexatious and harrassing, after seizure and while the servant was in custody, was not obstruction or hindrance, and that mere enticing or persuading the servant, after seizure, to escape was not a rescue, within the terms of the law. The party injured by such acts, must resort to his action for damages: he could not claim the statute penalties. So the Supreme Court of Alabama held, that enticing a slave to escape was not stealing the slave. All these acts work the same injury to the legal rights of the master as the acts prohibited under penalties: but they are not the *same acts,* and, therefore, the doers of them do not incur the penalties. Let the principles, illustrated by these examples, 37 be applied to the case before the Court, and can there be a reasonable doubt, that the words “after notice,” used in the law, refer to a state of facts which is not described by the words “well knowing,” as used in the declaration.

I do not insist that the notice shall be written: but I do insist that notice must be given—and given by the claimant, or some one acting for him. Notice to an endorser of demand and

non-payment need not be in writing: but notice must be given by the holder, or some one for him. Knowledge of demand and non-payment is not enough; there must be notice from the party who asserts the right. And this example seems to me to furnish a clear illustration of the principle. In both cases the object is to fix a legal liability, which would not exist without the notice. The only difference is, that the liability in the one case is for a penalty, and in the other for a debt.

I close this part of the argument with a single question;—Is there one case, in any book, in which a requisition of notice to charge a party with liability for a penalty, or even for a money demand of any kind, has been held to be satisfied by proof that the defendant knew the facts, of which he was to be notified?1

1 I ask attention to the following passages, which I extract from an essay, drawn up after the trial in the Circuit Court, by an able and learned lawyer, in no way connected with the case, and having no sympathy with the views of abolitionists.

“That the words knowledge and notice are synonymous in law, no tyro will pretend. Lawyers are too familiar with notices, ever to suppose that notice means knowledge. Putting a deed on record is notice to all the world, though not one in a million knows the fact. As notice then does not mean knowledge, neither does knowledge mean notice: a man may know a thousand things of which he has had no notice. I say, then, that no man, who speaks or writes the English language with any degree of accuracy, ever uses the words knowledge and notice as synonymous. No example Can be found in any of our classical writers where they have been so used; and there is no ground for supposing that Congress meant to use the word notice as synonymous with knowledge. On the contrary, there is strong reason to believe that Congress meant to use the word notice in its ordinary acceptation—meant, that before a person could be subjected to the penalties of this act, he should have notice given him in the ordinary mode that the person was a fugitive from labor, and that his master intended to reclaim him. * * *

It is a notorious fact, that there are a great many masters who will not move a finger to reclaim a runaway slave. They will not comply with the requisitions of the statute by giving notice, even though they know that they can recover their slaves by doing so. * * There are at this moment, more than ten thousand slaves in the state of Kentucky, to whom, if they were to runaway, their masters would bid Godspeed, and never lift a finger to reclaim them. They cannot let them go, for that would be contrary to the laws of their state. They cannot, with a clear conscience manumit them, because they are incapable of taking care of themselves. But if they go, they will feel themselves relieved from a heavy burthen."—2 *West. Law Jour.* 247.

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The next and only remaining question as to notice is, Of what does the statute require the party to be notified? And, as to this, I apprehend there can be but little doubt. The terms of the act are so clear that misapprehension is almost impossible. The language is this: "Any person who shall * * harbor or conceal *such person* after notice that he or she was a fugitive from labor *as aforesaid,* shall forfeit," &c. The words "as aforesaid," refer, beyond question, to the description, in the preceding section, of escaping servants, subject to reclamation. That description is clear and precise. The words are these: "A person held to labor in any of the United States under the laws thereof, who shall escape into any other of said States." The fourth section, then, must be construed as if it read thus: "Any person who shall * * * harbor or conceal *such* person after notice that he or she was held to service in one of the United States under the laws thereof, and has escaped into another of said States, shall forfeit and pay," &c. I think there cannot be any doubt of this.

The simple question then is, Does the declaration aver that the defendant had notice that the person harbored was held to service in one state, under its laws, and had 39 escaped into another? Or, is there any averment in the declaration of the same import? The actual averment has been already stated. It is that the defendant well knew "that Andrew was

the slave of the plaintiff and a fugitive from labor." Does it need argument to show that this averment is insufficient?

The language of the act of Congress is adopted from the Constitution. Every word of the clause in the Constitution was carefully weighed, and deliberately chosen, to define, with rigorous precision, the exact limits of the exception to the universal rule of freedom, which the framers of that instrument consented to introduce into it. The object of the clause was to secure, to a certain extent, the legal rights of slaveholders, by limiting the operation of the principles of liberty, which pervaded the constitutions and laws of many states, in a certain specified class of cases. To avoid all recognition of the rightfulness of slaveholding, the provision was made applicable to all servants held under state laws. To prevent all possibility that, under its sanction, slaveholders might introduce their slaves into the states which did not tolerate slaveholding, it was confined expressly to servants escaping from the state in which they were held, into another state. And to preclude, as far as possible, all interference with the principles and institutions of the several states, the prohibition of discharge from labor and service was limited to " *such* labor and service"—that is, to that labor and service, to, which the servant was held by the laws of the state, from which he escaped. The clause was felt to be a great concession on the part of the free states; although it was not one of the disputed clauses, nor did it originate in any of the compromises of the convention. It was 40 not contained in the articles of the Constitution as drawn up by the Committee on Detail. It was not even suggested, until late in the session of the Convention, when a clause to the effect that "fugitive slaves and servants," should be "delivered up like criminals," was proposed by the delegates from South Carolina.1 This, however, met with no favor, and was withdrawn.

1 3 *Mad. Papers,* 1447.

Subsequently a clause, nearly the same as that which now stands in the constitution, was proposed, and received the unanimous assent of the convention. At a still later period, the clause underwent further modifications; the great object of which was to exclude from the

Constitution the idea of a sanction to slaveholding, and to make the provision express the precise sense of the convention as to the matter of escaping servants.2

2 The clause as originally agreed to was as follows: “If any person bound to service or labor in any of the United States, shall escape to another state, he or she shall not be discharged from such service or labor, in consequence of any regulations subsisting in the state to which they escape, but shall be delivered up to the person justly claiming their service or labor. 3 *Mad. Pap.* 1456.

This clause, with all others then agreed on, were referred to a committee, 3 *Mad. Pap.* 1532, who reported a draft of the Constitution, which contained the clause modified as follows:

“No person legally held to service in one state escaping into another, shall, in consequence of regulations subsisting therein be discharged from such service or labor; but shall be delivered up on claim of the party to whom such service or labor may be due.” 3 *Mad. Pap.* 1558.

Afterwards, Mr. Madison says, “On motion of Mr. Randolph, the word ‘servitude’ was stricken out, and the word ‘service’ unanimously inserted, the former being thought to express the condition of slaves, and the latter the obligation of free persons.” 3 *Mad. Pap.* 1569.

From this it seems that, in the clause as proposed by Mr. Butler, and as reported, after modification, by the committee, the word “servitude” was originally employed and not “service.” The reason assigned for the after change, on motion of Mr. Randolph, suggests much for reflection.

Subsequently, Mr. Madison states, “the term ‘legally’ was struck out; and the words ‘under the laws thereof’ inserted after the word ‘state,’ in compliance with the wish of some who

thought the term ‘legal’ equivocal, and favoring the idea that slavery was legal in a moral point of view.” 3 *Mad. Pap.* 1589.

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The clause is confined to persons held to service in one state, under its laws, and escaping into another. The law is confined to the same class of persons. The notice, required by the law is, that the person harbored is a person of this precise class. To harbor a person, knowing that he is a slave and furtive from labor, is no offence against the law of Congress. The person harbored may be a slave in the state where he is harbored, and a fugitive from labor, in that state, and then he certainly does not come within the terms of the act; or he may have been a slave in another state, and a fugitive from labor, and yet it by no means follows that he was held to service under the laws of that state, and has escaped into another.

I pass over the objection that, in a free state, or in a case arising under the Constitution of the United States, the word slave has no legal meaning; and that it was impossible that Andrew, in Ohio, could be the slave of the plaintiff. These considerations are of little moment here, and I am willing to take the word slave in the sense in which it is obviously used as the synonym of servant. The difficulty of the plaintiff is, not in having used an improper word to describe the condition of the fugitive, but in this,—that the notice to the defendant, required by the statute, and made absolutely essential to the offence of harboring, is not alleged. For aught that appears, the notice may have been, that Andrew was the plaintiff's slave in some foreign state, and a fugitive from labor. The pleader has utterly failed to allege notice to the defendant, of the facts of which the statute says he must have notice, and consequently, has failed utterly to allege any title to the penalty he claims. I am wholly unable to see how this objection arising from the omission to aver notice can be met and overcome. F

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The Supreme Court of New Hampshire has gone as far as any court, in relaxing the rule of strict construction, as to penal statutes; and yet that court held a declaration bad on error, which described the offence with far more certainty than is to be found in this.1

1 *Fairbank* v. *Antrim,* 2. *N. H. Rep.* 205: See also, *Respublica* v. *Tryer,* 3 *Yates,* 458, as to the strictness with which the allegations of offence must pursue the statute.

The objection which has just been considered, applies as strongly to the second count as to the first. But the second count attempts to avoid one error of the first, by substituting the words “had notice” instead of the words “well knowing.” But the notice, alleged in the second, is the same as the knowledge averred in the first, namely: that “the said Andrew was the slave of the plaintiff, and a fugitive from labor.”

I pass to another objection to the declaration. I submit that it is essential, that a declaration claiming the penalty imposed by the law, for harboring fugitive servants must set forth the *facts* which *constitute* the offence.

Mr. Chitty lays down the rule as applicable to criminal cases, thus: “the indictment must state the facts of crime with as much certainty as the nature of the case will admit.”2 And the same rule has been sanctioned by the Supreme Court of Tennessee; “an indictment must contain a definite description of the crime charged, and a statement of the facts which constitute it, or judgment will be arrested.”3 The reason assigned for the decision is, that the prisoner, if indicted a second time for the same offence, may be able to show from the record, that it is the same offence. Examples of the application of the rule are frequent in the books. In one case,4 the defendant was “convicted for procuring from one Mary

2 *Chitty's Crim. Law.* 171.

3 *Tennessee* v. *Fields, Martin Yerger's Rep.* 137.

4 *Rex* v. *Murray,* 2 *Stra.* 1127.

43 Kinsford, by false tokens, a promissory note, under pretence that he would bring her money for it." And upon a motion in arrest of judgment, it was held that the indictment must specify the false tokens. So, an indictment for obtaining money under false pretences must state what these false pretences are.1 In another case, where a summary form of conviction was given by statute, in which the offence was required to be stated, for any agreement by journeymen manufacturers for controlling any person carrying on any manufactory, it was held that a conviction, alleging generally that the defendants were concerned in entering into a certain agreement, for the purpose of controlling A. B., without stating what the agreement was, was bad.2 This case may also be referred to, with advantage, for instruction as to the necessity of setting forth statutory offences, where the facts constituting it are not precisely stated, in the very words of the statutes.

1 *Rex* v. *Mason.* 2 *T. R.* 581; *Rex* v. *Preston,* 1 *Camp.* 495.

2 *Rex* v. *Nield,* 6 *East.* 417.

The rule laid down, in these cases, admits, indeed, of exceptions. It has been decided, that in an indictment for keeping a disorderly house, or for being a common scold, or for endeavoring to seduce a soldier from duty, it is unnecessary to allege the particular acts constituting the offence. The reason assigned is, that each of these offences consists of a number or series of acts which it would be difficult, if not impossible, to set forth. The reason of these excepted instances does not apply in this case. The facts which constitute the offence of harboring may be ascertained without difficulty. They may be easily set forth. There is no reason, then, for any encroachment, in this case, upon the great and salutary 44 rule, applicable not less to penal actions than to criminal prosecutions, that any person, accused of an offence, shall have the charge against him so precisely set forth, that he may not be unprepared in his defence.1 If this declaration be sustained, this great rule of justice as to this defendant, must be broken down; for it would require more than human sagacity to divine, from the words used in the plaintiff's declaration, of what the defendant was accused, and what was intended to be given in evidence against him.

1 *Bartlett vs. Crozier,* 17 *Johns.* 458: *Williams vs. Hingham,* 4 *Pick.* 366: *Loper vs. Harvard College,* 1 *Pick* 179.

What are the words? In the first count, that the defendant * * "did * * * * unlawfully receive the said slave * * into his service, and knowingly and willingly harbor, detain, conceal and keep the said slave."—In the second count, that the defendant "did * * knowingly, willingly * * * and unlawfully conceal the said slave from the plaintiff." In neither of these counts are any facts constituting the offence of harboring set forth, unless the allegation that the defendant received the slave into his service, in the first count, be the setting forth of such a fact.

I submit that the averment in neither count is sufficiently precise and certain. The allegation in the second count especially, which merely avers concealment, without stating any facts or circumstances constituting the concealment, cannot, it seems to me, be held to be a sufficient description of the offence.

The last enquiry which I shall submit to the court, in reference to the declaration, is this: Does it contain a sufficient averment, that the act of the defendant, in 45 harboring the fugitive servant, was contrary to the form of the statute? It will hardly be denied, at this day, that such an allegation is indispensable, in an action for a statute-penalty. The authorities are too numerous and too uniform to admit of a doubt. The courts, of later years, have said that if the question were one of first impression, the propriety of holding the plaintiff so rigorously to the precise averment might be doubtful: but the rule is regarded as too firmly established by authority to be shaken, except by legislation. And it is not sufficient if the declaration, omitting the averment that the act complained of was contrary to the form of the statute, conclude with the allegation, 'whereby, and by force of the statute, an action has accrued,' an allegation, by the way, wholly omitted in the declaration under examination. Nor is it sufficient that the plaintiff refer to the statute generally as the ground of his action. The allegation must be that the act complained of was contrary to the statute.1 Is this allegation contained in the declaration before the

court? There is an allegation that the defendant did certain acts, " *in consequence of which* the plaintiff lost said slave and *was deprived* of his services and of all benefits * * * which would have accrued * * * from such slave and his services, *contrary to the statute,* " &c. The loss of the fugitive servant and the resulting injuries are facts wholly immaterial. If no such loss or injury were

1 *Lee* v. *Clarke,* 2 *East.* 333: *Sears* v. *United States, per Story J.* 1 *Gall.* 259: *Smith* v. *United States, per Story, J.* 1 *Gall.* 265: *Renick* v. *United States, per Story, J.* 1 *Gall.* 271: *Mills* v. *Kennedy,* 1 *Bailey, S. C. Rep.* 17: *Barter* v. *Martin,* 5 *Green,* 79: where the Court says further, p. 80, "in a penal action, an essential feature ought to be directly averred instead of being left to be gathered by argument and inference: *Smith* v. *Moore,* 6 *Green.* 276: *Nichols* v. *Squire,* 5 *Pick.* 169: *Haskell* v. *Moody,* 9 *Pick.* 162.

46 he consequence of defendant's acts, he would still be liable, under the act relating to fugitives from service, for the offences prohibited by it, if properly alleged and proved. And yet these immaterial matters only are alleged to be 'contrary to the statute.' It may be said that this is a technical objection. I answer in the language of Mr. Justice Story: "As this is a penal action, if it be well founded in law, the plaintiff *ought* to have the *full* benefit of it."1 It may be said, also, that the allegation 'contrary to the statute,' may refer to the acts of the defendant. I answer that upon a *fair and correct* construction, the words refer to the allegation that the plaintiff *was deprived* of the slave and his services, and not to the act of harboring: and, in this action, the defendant is entitled to the benefit, even, of a strict and literal interpretation.2

1 1 *Gall.* 265.

2 *United States* v. *Mann,* 1 *Gall.* 187, and cues cited *ante p.* 16, 17, 18.

I now come to the question, What is harboring or cealing?

I have already observed that these two words were probably used in the act as equivalents: just as the words 'obstruct or hinder' are used to describe the same offence.

Whether they are or not, however, is a matter of no importance to this argument. No question arose upon the trial as to the concealment of Andrew. The only connection between him and the defendant was, that, by the defendant's permission or direction, he drove the wagon in which the other negroes were conveyed. He sat as driver, in open view, and was never concealed at all. I shall not trouble the court, therefore, with any observations as to the sense in which the term 47 ‘conceal’ is used in the statute, but confine myself to an inquiry as to the true import of the term harbor. The definition of this word as given by Bouvier and sustained by the Supreme Court of North Carolina, has been already stated.

If this legal definition shall not seem to the court to be the true one, I invite attention to other authorities which give the sense of the word in its ordinary use. Johnson defines the verb, to harbor, thus: “To entertain; to permit to lodge, rest, or reside; to shelter; to receive; to secrete. Webster follows Johnson. His definitions are: To entertain; to permit to reside; to shelter; to secrete. He illustrates the use of the word. in the sense of shelter or secrete, thus:

Harbour yourself for this night in this castle.

Richardson says that the word *harbor* comes from *her* an army, and *berg-en, beorg-an, byrg-an,* to defend, to secure, to fortify: hence, *here-berga,* a station where the army rests, and *herebyrig-an,* to harbor, to abide, to lodge, to quarter. “To harbor,” he adds,” “is generally, to secrete or protect; to receive or take under protection; to stay, remain, or abide in security; to shelter, to lodge; to afford or grant shelter or lodging.” Among the examples given by Richardson, are these, which illustrate at once the progress of the language and the meaning of the word

Holychurche, *herbergh* to all that ben blessede.— *Piers' Plouman,* p. 124.

I was *herbarweles* and ye *herboriden* me.— *Wiclif's Bible: Matthew, c.* 25.

I was *herbourless* and ye lodgid me.— *Bible* 1551; *Matthew, c.* 25.

Therefor he ledde them ynne and resseyuyde in *herbore,* and that nyght their dwelliden with him.— *Wiclif's Bible; Dedis,* or Acts, *c.* 10.

Temperance * * *

Obtaining *harbour* in a sovereign breast.— *Drayton.*

Your king, * * *

Craves *harbourage* within your city walls.—, *Shakspeare: K. John; Act II, S.* 1.

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For I was hungry and yee gave me meate, thirsty and yee gave me drinke, naked, and yee cloathed me; *harbourlesse* and ye lodgid me— *Homilies,* citing *Matthew, c.* 25.

All these examples, and all others cited by Richardson, shew that *harbor* always conveys the idea of rest, residence and shelter. It denotes always, whether used in a common or figurative sense, a kind of domicil, habitation, or abode, sometimes permanent but generally temporary. The notion of harboring, I think I may safely say, is never dissociated, in any correct use, from the notion of dwelling. To harbor never means, to afford facilities for flight. It never means, aid in the act of fleeing. It cannot, without the greatest violence to language, be made to signify transportation in an open market wagon, even if the transportation be intended to aid the flight of a fugitive servant, with full notice that he is such within the terms of the act of Congress.

There is appropriate language to describe such an act. Men, speaking of it, would say, “such a man aided the escape of such a one's servant,” or “he helped a runaway off.” No one would ever think of saying “he harbored the servant fifteen miles by letting him drive the wagon.” The word “harbor” in connection with such a transaction is felt to be wholly

inappropriate. Whoever may say that one man *harbors* another, when he only takes him up in the road and gives him a fide in order to help him escape, no matter from what, cannot fail to be conscious that he uses language in a strained and forced sense: that the term used does not, with any fitness and accuracy, describe the fact.

If the claimant is in pursuit and, for the purpose of preventing the arrest authorized by law, any person 49 should carry the fugitive servant away in a wagon or otherwise, so as to interpose an obstacle to the claimant in seizing or arresting the fugitive, his act would, doubtless, come within the rational and obvious signification of “obstruction or hindrance.” And, even if the claimant be not in pursuit, such a transportation may, with far less force upon language, be denominated “obstruction or hindrance in arresting,” than “harboring or concealment.” The very object of the transportation is, it is alleged, to prevent arrest: if so the object is to “obstruct or hinder” the arrest: and the means used are adapted to the end. The only circumstance wanting to complete the offence is the presence of the claimant or his agent attempting to seize or arrest. This circumstance undoubtedly is indispensable upon any proper construction of a penal statute: but I repeat, less violence is done to language, by holding the transportation' without this circumstance, to be “hindrance or obstruction in seizing or arresting,” than by holding it to be “harboring.” And it is to be noticed that the declaration before the court, contains a count for “obstruction and hindrance.” It was abandoned because the “obstruction or hindrance” could not be proved as alleged. It was not interposed, as alleged, against the plaintiff or his agent, but against two ruffians who were in the act of committing felony trader the laws of Ohio. And the counsel for the plaintiff felt that it was not sufficient to prove obstruction or hindrance generally, but the precise obstruction or hindrance described in the statute. They abandoned that count, therefore, and endeavored to accommodate the proof to the count for harboring or concealing. But, in attempting to avoid one difficulty, they rushed upon another, and, as it seems 50 to me, a greater. They proved a case of transportation, without concealment, for a short distance, with the intent,—as I will admit for the sake of the argument,—of aiding the escape of a fugitive slave. This case, thus stated,—and it will

not be pretended that the proof went beyond this,—is a case of “obstruction or hindrance.” It wants only the circumstance of being obstruction or hindrance of *the claimant or his agent* IN *arresting or seizing,* to make the case of *obstruction or hindrance* made penal by the act. But it is not, in any just or proper sense, a case of harboring.

Let it be supposed that an action was brought at common law for harboring a servant of the plaintiff; and the proof was, merely, that the defendant allowed the servant to ride in his wagon a part of the way to the place to which he was flying, with the intent to aid his escape, would this sustain the action? Is there any case, where any such proof as this has been held to make out the allegation of harboring? I am sure there is no such case; and I am confident that upon such proof no plaintiff ought to recover, or could recover.

A single point in relation to the true import of the word harboring remains to be examined. Is “ *any overt act* so marked in its character as to shew an *intention* to elude the vigilance of the master or his agent, and *calculated* to attain such a purpose, a harboring, within the meaning of the statute?”

I cannot but think, that the learned judge who thus defined the act of harboring, failed to mark the true nature of that act with his usual precision, and that upon mature reflection he will perceive that the definition is inaccurate.

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If the true legal definition of harboring be fraudulent concealment, then, doubtless, every act of harboring includes the intent to elude the master's vigilance, and is calculated, at least in the judgment of the harborer, to attain that object. But every act, so intended and calculated, does not amount to fraudulent concealment;—far from it. On the other hand, if it be held that receiving, entertaining, and sheltering, without concealment, may constitute harboring, then it is quite obvious that there may be cases of harboring, where there is no intention of eluding the vigilance of the master, and no adaptation of means to that end; and, also, cases where both the intention and the adaptation exist, but

which do not answer any ordinary definition of harboring. If harboring be not fraudulent concealment, then entertaining and giving shelter to a fugitive, knowing him to be such and after notice from the claimant, is harboring, although it may be done openly and without any concealment, and without the slightest intention to elude the vigilance of any body. On the other hand, directing the fugitive to a place of refuge; guiding him, no matter how short a distance, in his flight; lending him a horse to facilitate his escape; and, above all, enticing him to fly,—are acts intended and calculated to elude the vigilance of the master: but, in what dictionary of the English language is any definition of harboring to be found, which will fairly include them? Advising a fugitive to fly, after seizure, was held by Judge Washington, not to be a rescue, though of the same mischief; because, there can be no rescue, in the true legal sense of that word, without force. Shall it be said, that because it is an act calculated and intended to elude the master's vigilance, that it is harboring? Surely not. It may be held to 52 be rescue, with far less violence to the natural sense of language. There is no usage, and no authority, that I have been able to discover, which warrants the use of the word harboring in the sense, at once too broad and too narrow, assigned to it by the definition in the question certified. No rule of construction, governing the interpretation of penal statutes, or any other statutes, warrants such a definition. And I submit, with great deference, that it cannot be maintained, that Congress used the word in the sense supposed,—as a sort of *residuary* term, which should include in its comprehensive inport, all possible injuries to the rights of masters, not already made penal under the denomination of obstruction, hindrance, or rescue. Such an intention will not be ascribed to Congress without some evidence of it; and, I respectfully ask, where is the evidence of any such intention?

If it be said that upon this construction of the statutes, a master may, in many cases, be deprived of his servants by acts which will not expose the doer of them to the statute penalty:—I repeat the answer I have already given: the statute must not be made broader by construction. Words must not be forced out of their usual sense and meaning. Language must not be accommodated to a sense which it does not ordinarily convey.

Shall it be said that public security is a less important end, than the right of a master to his servant? That less strictness shall be required in the construction of an act for the reclamation of fugitives from service, than will be observed in construing acts to prevent misdemeanors or felonies? Shall it not be rather said, that if the plaintiff does not bring his case strictly within the 53 act, he cannot entitle himself to me penalty, out must resort to such other remedies as the law may give; or, if the law affords no other, that he must await amendment by the Legislature.

The act doubtless is defective. It gives no penalty for enticing to escape; none against obstruction or hindrance after seizure, which does not amount to setting the servant at liberty by force; none against enticing to fly after seizure; none, as we claim, against transportation, without concealment, with or without intent to aid an escape. It provides no process by which the fugitive shall be brought before a judge or other magistrate for the investigation of the claim; authorizes no commitment to custody; provides no mode of removal except by the mere force of the claimant. Mr. Justice Washington points out nearly all these omissions, and, speaking of some of them, says that “an attempt has been made in Congress to correct these glaring defects, without which correction the act is found to be, practically, of little avail: but the attempt has not as yet succeded.”1

1 *Worthington* v. *Preston,* 4 *Wash.* 461: *see also, Hill* v. *Low,* 4 *Wash.* 326, *and Ex parte, Simmons,* 4 *Wash.* 396.

In *Blackmore* v. *Phill,* 7 *Yerg.* 463, it was claimed that a slave, taken from Tennessee, where emancipation is prohibited unless by assent of the legislature or the county court, to Illinois, for the purpose of being manumitted, and after such manumission immediately brought back into Tennessee, did not gain his freedom, the whole proceeding being in contravention of the policy of the state. The Supreme Court of Tennessee, composed of Carton, C. Justice, and Peck and Green, Associates, held, that though it might be contrary to state policy, yet there was no enactment prohibiting it, and they could not supply the law. The language of the court is very applicable here: “It is a *casus omissus;* and the evil,

if it be one, is not remedied by any enactment. We cannot, for the purpose of preserving our policy from violation, make the law. It is enough for us to administer such as are made to our hands."

Will this court, by construction, attempt to supply any of these defects? I trust and believe they will not. In my humble judgment, no more fatal blow could be 54 inflicted upon the stability of our institutions, than by such an assumption of the duties of the Legislature. It is not to be disguised that multitudes, in all parts of the country, regard the act of the defendant, admitting it to have been done for the purpose of aiding the escape of a fugitive slave, not merely as no crime, but as an act of humanity and mercy. He did not seek to deprive the plaintiff of his slave: he did not go into Kentucky to excite him to escape; he had nothing whatever to do with his escape. But he was appealed to for aid by a person who had already escaped, and he yielded to the appeal, not to injure the master, but to benefit the slave. Not even in any slave state,—certainly by very few even of slaveholders,—will such an act be regarded as morally wrong. The passages which I have cited in illustration of the true sense of the word "harbor," from that Revealed Law, to which all other law must yield, most impressively teach that the act of the defendant was no crime. If then, that act shall be made an offence by construction,—if, not being within the terms of the law taken in their natural and usual sense, it shall be brought within them, by intendment,—the impression on the public mind must be deep and painful. Far from adding anything to the security of the master's legal rights, it will involve the assertion of those rights in perils and difficulties never hitherto encountered. For it will arouse that spirit of martyrdom, which in the midst of acts believed to be acts of justice and of duty, regards, if not with indifference, yet with calm defiance, the commands and the penalties of unjust law.

I here close my remarks upon the several points in this case, which arise under the act of Congress of 1793.

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If I have been so fortunate as to satisfy the Court that the several positions I have maintained, are sound in law, the questions certified for decision, which arose upon the construction of that act, before verdict, must be answered, substantially, thus:

1. The notice required by the act of 1793 to charge a person with the penalty imposed by that act for harboring or concealing a fugitive from labor, need not be in writing.

2. The notice required by the act must be given by the claimant of the fugitive, or some one acting for him, to the person to be held liable for the penalty, either in writing, or verbally, or by publication brought home to the party to be charged.

3. Clear proof of the knowledge or belief of the defendant, that the person harbored was a slave and fugitive from labor, is not sufficient to charge him with notice under the act; for,

1. The terms “after notice,” as used in the act, are not the mere equivalent of “knowing,” which is also used, but their true import is, after information communicated to the defendant with design to charge him, either by the claimant, or some one acting for him.1

1 I have omitted to refer the Court to the enactments against harboring in the several states. So far as I have examined them, I do not find that, in any one, is language similar to that of the act of 1793 employed. The statutes of Missouri prohibit harboring any minor, apprentice, servant or slave, *knowing, or having reason to believe* him to be such. *Statutes of Missouri,* 318. The statutes of Kentucky make it a penal offence to conceal a runaway slave “ *knowing*” him to be such. 2 *Statutes of Kentucky,* 318. The Statutes of Alabama prohibit “ *knowingly*” harboring slaves under certain circumstances. *Toulmin's Digest* 628, 641; *Revised Statutes of Arkansas,* 731. The statutes of other states, as that of Virginia for example, *Tate's Digest* 494, prohibits secretly harboring; and even in actions upon these statutes it is necessary to aver that the defendant knew the person harbored to be a person within the prohibition of the law. *Birney* v. *Ohio,* 8 *Ohio Rep.* 238. How can it be held then, under the act of Congress, which adds to the requirement of knowledge, the

additional requirement of notice, that this latter requirement means nothing,—is merely superfluous.

2. Notice or knowledge that the person harbored was a slave and fugitive from labor, is not notice or knowledge, that such person was held to service under the laws of one state and escaped into another.

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I add that in Ohio, the testimony of negroes in a case where a white man is a party, is not admissible in a court of justice. Of course, evidence of their statements made to the defendant as to their conduct, must, also, be inadmissible; and knowledge or belief, founded upon such statements, cannot, in consistency with the rule excluding their own testimony, be held to charge the defendant.

4. Receiving a fugitive from labor, at three o'clock in the morning, or at any other hour, at a place in Ohio twelve miles from the place where he was held to labor in Kentucky, and transporting him in a closely covered wagon twelve or fourteen miles, so that the fugitive escapes pursuit, and his services are lost to his master, is not a harboring, or, necessarily, a concealing of the fugitive within the statute.

It is, certainly, not a case of harboring within any ordinary use of that word. If concealing be a distinct offence under the statutes, and the court shall be of opinion that to constitute that offence it is not necessary that the fugitive should be harbored, that is, received, sheltered, protected or entertained, at or in some certain place, then transportation under the circumstances enumerated, may amount to the concealment prohibited by the act, provided there be *an intention to conceal.* But such transportation merely, *without such intention,* is not concealment. The circumstance that, by the transportation, the fugitive escapes pursuit and his services are 57 lost to his master are immaterial. They are not made, under the act, of the slightest consequence to the question, *Concealment,* or, *no concealment?*

5. Any state of facts, which makes a case of harboring or concealment, if the fugitive escape, will make such a case, though the fugitive may be recaptured.

6. Transportation of a fugitive in an open wagon twelve or fifteen miles, is not a harboring or concealing of him within the statute. The loss of the services of the fugitive is an immaterial circumstance.

7. A formal claim of the fugitive from the person harboring or concealing him, need not precede or accompany the notice.

If the notice be given, it is enough to apprize the party that his acts are in prejudice of an asserted right: indeed, the very object of the requirement of notice is that the party to be charged may be apprized of the existence of the fight and the intention of reclamation, and of the facts essential to the existence of the right. The notice, in short, amounts to a claim.

8. It is too broad to say that any overt act, so marked in its character as to shew an intention to elude the vigilance of the master and calculated to attain such an object, is a harboring of the fugitive within the act. Such an act may be an act of harboring; but is. not always and necessarily so; and there may be harboring where there is no such overt act.

It will be observed, and it may be important to observe, that all these questions relate to the *proof* necessary to establish a case of harboring or concealing under the act. They are questions, not upon the declaration, but upon the evidence, arising, not after verdict, but before verdict. They are questions as to instructions H 58 proper to be given to the jury, and, consequently, there can be no presumption in favor of the existence of any facts not directly stated in the certificate of division:—no such presumption, as is made often after verdict, in favor of a title substantially, but defectively stated. The court is to act, as if called upon now, originally, to say what facts and circumstances it is necessary to *aver and prove,* in order to make out a case of harboring.

And this is a view of the case which I feel very desirous to have taken into deliberate consideration. It is of vast consequence that the construction of the act be correctly settled, in accordance with general principles, applicable to the construction of similar statutes; and that it should be distinctly known what facts must be averred and proved to make a case which will subject defendants to its penalties. The result to the immediate parties is, comparatively, of little importance.

The questions, which arose after verdict,—still proceeding on the supposition that my reasonings have been so fortunate as to meet the approbation of the court,—must be answered substantially thus:

1. The declaration of the plaintiff in neither count contains the necessary averment of escape from the state of Kentucky into the state of Ohio.

2. Nor does the declaration, in either count, contain the requisite averment of notice.

3. Nor does either count contain a proper allegation that the defendant harbored the fugitive, because the acts constituting the harboring or concealing are not set forth.

4. Each count is otherwise insufficient in these respects:

1. The first count, in that it does not, with any certainty, allege *who* escaped:

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2. The same count, in that it contains no certain allegation that *any one* escaped:

3. The second count, in that the allegation of concealment is imperfect and defective:

4. Both counts, in that neither concludes against the form of the statute.

It is said that these defects are cured by the verdict. Some of them, perhaps, may be: but such of them as go to the title to the penalty certainly are not. In fact, in nearly, if not

quite, every case which I have cited, the objections to the declaration were taken, not only after verdict, but after judgment, and yet sustained. I presume, also, that this court will answer the questions certified without undertaking to say what shall be the application of the answers to the case in the Circuit Court. The questions concern the sufficiency of the declaration, and the object of them is to obtain the judgment of this Court upon that. The Circuit Court may be safely left to apply that judgment to the case before it.

I submit only a single additional remark upon this part of the case. I have discussed most of the questions in the cause as arising upon the declaration; and I have done so for the sake of convenience: but, in fact, three of the most important questions, namely,—What facts constitute an escape? What is notice? and, How is it to be given? are questions or, at least, essential elements of questions which arose before verdict, and of course, cannot be affected by it: while another important question—What *is* harboring? arose, also, before verdict: although the question,—What is a *sufficient averment* of harboring?—arose after verdict.

I regret the necessity of troubling the court with these 60 discriminations; but they seem essential to a correct view of the whole case.

I shall now pass to the questions which arise not under the act, but under the constitution and ordinance of 1787.

And the first of these questions is this: Is the act of 1793, repugnant to the ordinance of 1787?

At the close of the revolutionary war, the Congress of the United States claimed the territory west of the Alleghanies, as a country conquered from Great Britain, to be held and disposed of for the joint benefit of all the states. On the other hand, the same territory was claimed by several states, as belonging, wholly or in part, exclusively to them.

These conflicting claims were adjusted by compromise in the result of which, the government of the United States obtained undisputed possession of the region north-west of the Ohio, and proceeded to provide for a temporary government, for the organization of states, and for the permanent establishment of certain great fundamental principles, as the immutable basis of all laws, constitutions and governments within the territory.

The ordinance of 1787 was designed to accomplish these interesting objects. It was almost the last work of the Congress of the Confederation;—that illustrious body, whose wisdom, fortitude, magnanimity and devotion to freedom attracted and still attract the general homage of mankind;—and, among all its splendid titles to honor and veneration, none shine brighter than this great act. It lies at the very foundation of the institutions of the free North-west: and, in all time to come, it will be, as, in time past, it has been, regarded reverently, as the source and safeguard of its prosperity and power.

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The power of the Congress of the Confederation to establish this ordinance has sometimes been drawn in question: But never, with success. The Congress of the Confederation represented the United States in carrying on the war with Great Britain, and, in that capacity, might doubtless, hold all acquisitions made by conquest from the common enemy, for the general benefit of all the States. The country west of the Alleghanies was an acquisition so made. The right of the United States thus acquired was confirmed by the cessions of the states to the whole vast territory north-west of the Ohio. The title, thus acquired and thus confirmed, was held by the United States in trust, for the benefit of the several states, subject to certain conditions in the deeds of cession. In the execution of this trust, Congress proceeded to promulgate and establish the ordinance of 1787; and it cannot be doubted, it seems to me, that, holding the proprietary title in the land and complete jurisdiction over the territory in every respect, Congress had a perfect right to prescribe conditions of settlement within the territory, and establish principles, to which all laws and constitutons established within it should conform, provided only, that these

conditions and principles should not be incompatible with the great ends in view, the common benefit of all the states, and the creation and admission into the union, of new states upon equal footing with the original states.

Accordingly the ordinance, after making various temporary provisions, proceeded to announce certain articles of *compact* between the original states and the people and states in the territory, and declared that they should REMAIN FOREVER UNALTERABLE, unless by common consent. These articles established the inviolability of 62 contracts, the sacredness of personal liberty, and the entire freedom of conscience. They recognized and enforced the duty of government to foster schools and diffuse knowledge. They declared the navigable rivers of the territory to be common highways and forever free to the inhabitants of the territory and to the citizens of the United States and of any other states that might be afterwards admitted; they enjoined the observance of good faith towards the Indians, and the performance towards them, of those acts of kindness and peace, which should ever adorn the intercourse of the mighty with the weak; and finally, that nothing should be omitted, which might be thought justly to belong to an instrument providing for the creation of free states, they declared that “there should be neither slavery nor involuntary servitude within the territory, otherwise than in the punishment of crimes.”

The great object of these provisions was explicitly declared. It was to “extend the fundamental principles of civil and religious liberty, which form the basis, whereon these republics, their laws, and constitutions are erected; to fix and establish these principles, as the basis of all laws, constitutions and governments, which, forever, hereafter, shall be formed in said territory; to provide also, for the establishment of states and permanent government therein, and for their admission to a share in the federal councils, on an equal footing with the original states.”

I know not that history records a sublimer act than this. The United American States, having just brought their perilous struggle for freedom and independence to a successful issue, proceeded to declare the terms and conditions on which their vacant territory

might be settled and organized into states; and these terms were,—not 63 tribute, not render of service, not subordination of any kind,—but the perpetual maintenance of the genuine principles of American liberty, declared to be incompatible with slavery; and that these principles might be inviolably maintained, they were made the articles of a solemn covenant between the original states, then the proprietors of the territory and responsible for its future destiny, and the people and the states who were to occupy it. Every settler within the territory, by the very act of settlement, became a party of this compact, bound by its perpetual obligations, and entitled to the full benefit of its excellent provisions for himself and his posterity. No subsequent act of the original states, could affect it, without his consent. No act of his, nor of the people of the territory, nor of the states established within it, could affect it, without the consent of the original states.

The ordinance was not adopted upon any sudden impulse. It was a deliberate, well considered act, and it received the unanimous assent of the states. There was not even a single negative from any delegate of any state, except that of one member from New-York.

There can be, in my judgment, no ground whatever, for saying that, at any time, before the organization of state governments within the territory, these articles of compact, were in any respect, changed. They could not be affected by the adoption of the constitution of the United States, for that was the act of the people of the original states, to which the people of the territory were, in no sense, parties. The constitution of the United States, neither did, nor could, of itself and without the consent of the people and states of the territory, repeal, impair, abridge or alter the terms of the compact. 64 It left them, as it found them, in the full force of their original obligation.

Nor was it supposed by any body, at the time of the adoption of the constitution, that it impaired the full effect of the ordinance. This is manifest from the express terms of the act to provide for the government of the territory north-west of the river Ohio, passed at the first session of the first Congress under the constitution.1 The object of that act was declared, in its preamble, to be “that the ordinance of 1787 may CONTINUE TO HAVE

FULL EFFECT." It conformed the temporary arrangements of the territorial government to the action of the new National Government, but did not touch at all any provision of a permanent nature.

1 1 *Story's Laws, U. S.,* 32.

Nor did the admission of the state of Kentucky into the Union, in 1792, affect the compact; for that was an act between the states, represented by Congress, and the people of Kentucky, represented by their convention, with which the people of the territory had no concern.

When the State of Ohio came into the union, in 1802, it was under the provisions of an act of Congress, which contained an express proviso, that the constitution of the new state should "be republican, and NOT REPUGNANT to the ordinance of 1787, *between the original states and the people and states of the territory.* "2

2 2 *Story's Laws,* 870.

The constitution of Ohio was framed in accordance with these provisions. The Convention of the People of the territory incorporated into the constitution of the new state, the leading principles of the ordinance; thereby claiming for the people of Ohio, the benefit of those provisions; recognizing their perpetual obligation, and imparting to them an additional sanction. The interdict 65 against slavery was transferred to the constitution in the very words of the ordinance;1 and, as if to manifest as plainly as possible the sense of the people on this subject, an additional provision was inserted, declaring that "no alteration of the constitution shall EVER take place, so as to introduce slavery or involuntary servi tude into this state."2

1 1 *Chase's Statutes of Ohio,* 82. *Cons. Art.* 8, *sec.* 2.

2 1 *Chase* 81. *Cons. Art.* 7, *sec.* 5.

Ohio, in truth, came into the union, not so much in virtue of any act of Congress consenting to her admission, as in virtue of a right secured to her by the ordinance, and which could not have been denied to her without a flagrant breach of faith. The ordinance itself provided for the erection of states within the territory; and authorized such states to form permanent constitutions and state governments; and stipulated for their admission, by their delegates into the Congress of the United States, upon the single condition that the constitution and the governments so to be formed, should be republican, and in conformity with the principles contained in the compact. The territorial limits of Ohio were defined by the ordinance, subject to the right of Congress, to form one or two states out of that part of the north-western territory lying north of an east and west line through the southern bend or extreme of Lake Michigan.3 It was the right of the people within the limits thus defined, to form their state government and come into the union, whenever the number of inhabitants should reach sixty thousand; and earlier, if consistent with the general interests of the confederacy. And, as it was their right to come in, under the ordinance, and, as it was by that instrument

3 See the Ordinance, 3 *Story's Laws,* 2073.

66 made their duty to frame their government and constitution in accordance with the articles of compact, it seems impossible to maintain that by the act of entering the union, any of those articles could be abridged, impaired, or, in any way, modified. Certainly, the evidence of intention, both on the part of the People of the state and of the United States, that the articles of compact should stand unchanged, is full and complete.

Ohio, then, came into the union, with the ordinance in her right hand. Her constitution did not supercede the ordinance; but, on the contrary, re-affirmed most of its provisions, and promulgated them anew, as “great and essential principles of liberty and free government,” to be “forever unalterably established,” for the benefit of the people of the state.1 And it is quite true, that most of the principles established by the ordinance, for all time, as fundamental law, are nothing else than the principles of natural right and justice; the

obligation of which, although it may be recognized and enforced by compact, is derived, not from any agreement or consent, but from the essential constitution of man and society.

1 *Cons. of Ohio, Art.* 8,

What, then, under the ordinance, were the obligations of the people of Ohio, and what the rights of citizens of other states, in relation to escaping servants?

The clause in the ordinance, after prohibiting the existence of slavery in the territory, proceeds thus: " *Provided,* always, that any person escaping into the same, from whom labor or service is lawfully claimed in any of the *original* states, such fugitive may be lawfully reclaimed, &c."2

2 1 *Story's Laws,* 2078.

This exception to the prohibition was confined to the 67 original states, not by accident, but of purpose; for the clause securing to the citizens of the states, the use of the rivers of the territory, is extended expressly to citizens of states, thereafter to be admitted into the union.1 It is quite probable, that, at that time, it was not supposed that any new slave state would ever be admitted into the union. The clause therefore, must be taken as it is found, and must receive the construction which its language demands. Its plain import is, that the right of reclaiming fugitives from service is confined to the citizens of the original states.

1 3 *Id.* 2077.

The only exception to the prohibition of slavery, or involuntary servitude, is this restricted right of reclamation. If this right of reclamation may be extended to citizens of other states, the prohibition may be narrowed and restrained in its operation. If it can be narrowed or restrained, it may be destroyed. The power which can modify, may abolish. It is obvious, that the prohibition in the ordinance must be maintained unimpaired, or surrendered altogether. It must be enforced as to all slavery and involuntary servitude, except that to

which a fugitive from an original state must be surrendered, or it must be held to be no security whatever against the introduction of slavery into the state. If it can be successfully maintained, that the clause in the federal constitution extended the right of reclamation to the citizens of new states, it will follow that an amendment to that constitution may give to the citizens of other states, emigrating into Ohio, the right to bring their slaves with them and hold them there. An amendment of the constitution, may be adopted without the assent of a 68 single state north west of the Ohio; and consequently, the entire clause prohibiting slavery, as well as every guaranty of personal rights contained in the ordinance, may be swept away, against the will of the people and the states of the north-west.

Up to the time when Ohio came into the union, it cannot be reasonably pretended that any servant escaping into the north west territory from any state, not being one of the original states, could be reclaimed; for, up to that time, there is not the slightest ground for saying that the people of the territory, had, in anywise, assented to any extension of the right of reclamation.

And when Ohio did come into the union, it was upon the express condition on the part of Congress, and with the full understanding on her part, that her constitution and government should be established in conformity with the ordinance.

The state of Ohio and the courts of Ohio have never regarded the ordinance as abrogated by the admission of Ohio into the union. The Supreme Court of the state has declared the articles', of compact to be of higher obligation than the state constitution: “for the constitution may be altered by the people of the state, while these cannot be altered without the assent both of the people of this state, and of the United States, through their representatives. It is an article of compact, and, until we assume the principle that the sovereign power of the state is not bound by compact, this clause must be considered obligatory.”1 And Mr. Justice McLean, referring to the possibility that a majority of the voters of Ohio might so alter the constitution as to admit

1 *Hogg* v. *Zanesville Canal and Manufacturing Company,* 5 *Ohio Rep.* 414.

69 slavery, observed: “But does not the compact prevent such an alteration without the consent of the original states? If this be not the effect of the compact, its import has been misconceived by the people of the state generally. They have looked upon this provision as a security against the introduction of slavery, even beyond the provisions of the constitution. And this consideration has drawn masses of population to our state, who now repose under all the guaranties, which are given on this subject by the constitution and the compact.”1 And Mr. Justice Story, in his notice of the ordinance in his work on the constitution, does not intimate any doubt as to the permanent obligation of its articles of compact.2

1 *Spooner* v. *McConnell,* 1 *McLean,* 349.

2 3 *Comm. on Cons.* 188.

And will it now be said that Ohio,—though no such thing was intended, or, in any quarter, so much as thought of,—by the act of entering the union, gave her assent to a modification of the provision of the ordinance which prohibits slavery? Will it, can it be said, that the constitution of the union, which we have ever understood, was designed to favor liberty, did, in fact, admit slavery where it had been prohibited by the act of the nation?

With quite as much—with even more—reason may it be maintained, that the clause in the compact, assuring to all the people of the United States the unobstructed navigation of the rivers of the northwest, has been abrogated, by the admission of the states, created out of the territory, into the union. The compact in relation to navigation, and that in relation to slavery, stand upon the same foundation.3 And it has never been doubted, so far as I am advised, that the provision in regard to

3 1 *McLean,* 349.

70 navigation is a limitation, both upon the general government and upon the state, securing to the citizens of the union valuable and important rights.1

1 *Hutchinson* v. *Thompson,* 9 *O. R.* 66.

Mr. Justice McLean, in the case for damages already referred to, intimated no change in his opinion, as to the permanent obligation of the compact, expressed in *Spooner* v. *McConnell;* but seemed to think that the act of Congress was not in violation of the compact, but only an extension of the principle recognized in the compact to analogous cases. But I submit with great deference, that this very extension constitutes the violation. The compact prohibits all slavery, except in a certain class of specified cases. The act of Congress enlarges this exception, and of course, restricts the general rule of freedom. Surely this is impairing the obligation of the compact: and, if so, to this extent, the act is void.

If, then, the interdict against slavery be of permanent obligation, unaffected by the admission of Ohio into the union; if that interdict, on which the people of Ohio and the North west have hitherto reposed, be not delusive and vain; it cannot be doubted, it seems to me, that the act of 1793, so far as it authorizes the reclamation of servants escaping from the state of Kentucky, which is not one of the original states, must be held to be of no effect.

The interdict against slavery is not the only clause of the compact violated by the act of 1793. There is not one of the guaranties of personal rights established by the ordinance, which is not, in my judgment, violated by this act. But I shall reserve what I have to say on these points, until I come to compare the act with the guaranties of personal rights, contained in the constitution.

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I now reach the gravest and most momentous question in this important controversy:—

Is the act of 1793 repugnant to the Constitution of the United States?

I am met at the threshold, by the objection, that this question has already received the full consideration and final decision of this court, and is no longer an open question. But, with the greatest deference, I submit that no single decision of any tribunal, however exalted, upon a question of such high consequence as this, should be regarded as absolutely final and conclusive. I need not, I am sure, remind your honors, that the most thorough investigation, the clearest apprehension, and the largest learning, are not absolute safeguards against error. Even this court has found occasion, heretofore, to revise, qualify, and sometimes, overrule its former decisions: and I feel well assured that the enlightened judges, who now sit here, will not refuse to hear with patience, and consider with candor, an argument, urged, respectfully and in good faith, by the humblest member of the profession, to induce them to recall any decision, however well weighed and unanimous, if pronounced after a single hearing. Especially will this Court listen to such an argument, when the opinion sought to be changed, was not unanimous; not necessary to the determination of the precise question before the court at the time; and, sustained by those who concurred in it, upon different, if not repugnant, reasons.

The precise question before this Court, in the memorable case of *Prigg* v. *Pennsylvania,* was this:—Are the statutes of the states,—which denounce as a crime, the abduction from their respective jurisdictions, of persons 72 residing or being within them,—unconstitutional, in their application to the masters and the agents and attorneys of masters, who remove fugitive servants by force, and without any sanction from the laws of the state or from the acts of Congress? In other words,—Does the Constitution of the United States, of itself and without legislation by Congress or the States, confer on the masters of fugitive servants, the right, in person or by their agents, to retake them by force, in any state to which they may have escaped, and convey them out of such state to that from which they fled, without process or judicial sanction; and are all laws of the states to prevent kidnapping or abduction by private force, unconstitutional and void in their

application to such cases? The court held that the master of a fugitive slave may pursue and recapture him, and convey him out of the state in which the seizure is made, without complying with the provisions of the act of Congress or of the state laws on the subject, and that all state legislation making such seizure and abduction penal, is unconstitutional and void.

It may be doubted, indeed, whether this decision can be quite consistent with the affirmation of the constitutionality of the act of 1793. It would rather seem, if it was the intention of the framers of the constitution that the clause respecting fugitive servants should have the effect attributed to it, that they meant to dispense with legislation by Congress and the states altogether: and this conclusion is greatly strengthened by the fact that no power to legislate on the subject is conferred, unless by very remote implication, upon Congress, by the constitution. The opinion of Mr. Justice Baldwin, indeed, went upon this ground. But, be this matter 73 as it may, it is, at all events, quite certain that it was not at all necessary, in order to reach the decision to which the court came, to affirm the constitutionality of the act of 1793.

No question, therefore, as to the constitutionality of that act was necessarily before the court in the Prigg case. Its constitutionality was indeed, affirmed; by some of the judges, as the exercise of a power vested exclusively in Congress; by others, as the exercise of a power concurrent in Congress and in the state Legislatures. One learned Judge, Mr. Justice McLean, held, that the act conferred an exclusive power on Congress, but dissented from the opinion that the master of a fugitive could exercise the power of recaption, under the constitution, in disregard of the provisions of the statute. He held, on the contrary, that for such acts the master was amenable to the criminal laws of the state, which he thereby violated.

In no former case, I think, has so great a diversity of views marked the reasonings by which the several judges of this Court have reached their respective conclusions. Perhaps, also, it is not too much to say, that the decision of the majority, both as to the right of

recaption under the constitution, and as to the constitutionality of the act of Congress, has failed to command the assent of the profession, especially in the nonslaveholding states. The decision has been submitted to, as the judgment of the highest constitutional tribunal of the country; but submitted to, generally, in the hope and with the expectation, sometimes expressed and sometimes silently entertained, of its ultimate reversal here.

It is quite certain, also, as I think, that the right of reclamation, converted by the decision into a right of K 74 recaption, has not been fortified, but, on the contrary, seriously impaired by it. The right is placed, by the opinion of the court, upon a ground, so repugnant to the feelings of all classes of men in the north and northwest, and so subversive of the sovereignty and independence of the states, that it encounters, at this moment, a degree of jealousy and hostility beyond all former precedent. The presence of the slave hunter, ranging, at will, through the free states, and clothed with a power, above the control of state laws, and state constitutions, and state authorities, to seize and drag beyond state limits, without legal process, and without any judicial sanction, state or federal, persons, who, for aught that appears beyond his bare assertion, are as much entitled to the protection of the law as he is himself, is a portentous anomaly, not to be contemplated without alarm and irritation. Every attempt to put this power into actual exercise, leads, and must necessarily lead, to commotion and violence; and every scene of commotion and violence tends to gather around the right of reclamation an indignant public sentiment, which must, at length, deprive it of all practical value. It has been said, that, to the extent of giving the right of recaption, the constitution executes itself. It may be said, I think, with entire truth, that, upon the construction given, it not only *executes* itself, but the right of recaption also. If there can be a suicidal power, it is that of seizing, in a free state, persons claimed as fugitives from service, and taking them beyond its limits, by private force, and without judicial sanction.

I proceed, without further delay, to state the proposition which I shall endeavor to maintain. It is this:

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The act of Congress of February, 1793, so far as relates to fugitives from service, is unconstitutional and void:

1. Because the provisions of the act are repugnant to several positive provisions of the Constitution.

2. Because the Constitution confers on Congress no power to legislate at all upon the subject.

I insist, first, that the provisions of the act of 1793 are repugnant to several positive provisions of the Constitution.

In order to obtain a clear understanding of this matter, it will be necessary to advert to the circumstances of the country, and the state of public opinion, at the time of the adoption of the Constitution; and it will also be proper to consider what slavery, as a legal condition, really is.

It is thought, by some, that a leading object in the formation of the Federal Constitution was to secure to the citizens of the slaveholding states their rights of property in slaves. But what is there in the history of the country, or of the Constitution, to warrant such an opinion? On the contrary, does not that history prove that it was the clear understanding of all parties concerned in the establishment of the National Government, that the practice of slaveholding was inconsistent with the principles on which that government was to be founded? And that it was their settled purpose,—however that practice might be tolerated or legalized in certain states, with whose legislation the General Government could not interfere,—that it should receive no national sanction whatever?

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It seems to me that no unprejudiced student of our history can come to any other conclusion than this.

The very first act of the first Congress of the Confederation—the memorable non-importation, non-consumption and non-exportation agreement of that illustrious body—contained a clause, by which the delegates pledged themselves and their constituents to discontinue, wholly, the traffic in slaves. This clause has been often quoted, but is of sufficient interest to justify its introduction here:

“We will neither import nor purchase any slave imported, after the first day of December next, (1774,) after which time we will wholly discontinue the slave trade, and neither be concerned in it ourselves, nor will we hire our vessels or sell our commodities or manufactures to those who may be concerned in it.”1

1 1 *American Archives,* 914, 4 *th Series:* where the facsimile signatures of the delegates may be seen.

Two years afterwards the Declaration of Independence was promulgated. No one will be willing to say that its language was not carefully considered, or that the patriot statesmen, who put their names to it, were hypocrites who sought to delude the world by empty flourishes of rhetoric. It will be admitted that they were earnest men, who meant what they said. Well, these men, at that solemn moment, and in that solemn appeal to God and Mankind, chose to put their cause upon the solid foundation of equality of rights among men. “We hold” they said, “these truths to be self-evident; that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.” This declaration was put forth to the world as an expression of the deliberate judgment of 77 the American People. It was adopted and recognized as its own act by every Colony which acceded to the Confederation. It is not going too far, in my poor judgment, to hold this declaration to be an authentic promulgation of the common law of the Union in respect to the inviolability and inalienability of personal liberty, and inconsistent with the longer continuance of slavery in any of the States. It is not impossible that such was the effect expected from it, by some, at least, of those who put it forth. Be this as it may, however, it seems to me quite certain that the language

of the declaration is wholly inconsistent with the idea that the American States, as *One Nation,* were expected, in any national act, or by any national document, to acknowledge or endure slavery, as an institution fit to be fostered or sustained by national authority.

When the war of the revolution terminated in the recognized independence of the republic, the Congress issued an address to the states, the leading object of which, was to persuade to the provision of a fund for the discharge of the public engagements. In the conclusion of this address, I find this passage, which I deem worthy to be considered in this connection: “Let it be remembered, finally, that it has ever been the pride and boast of America, that the rights for which she contended, were the rights of human nature.”1 Whatever else may be said of this, it cannot be denied that it proves, beyond controversy, that the Declaration was intended to assert the right to liberty, not as vested in a

1 And well worthy to be deeply pondered by every American, are these concluding sentences of this address: “In this view, the citizens of the United States, are responsible for the greatest trust ever confided to a political society. If justice, good faith, honor, gratitude and all the other qualities, which ennoble the character of a nation and people, and fulfil the ends of government, be the fruits of our establishment, the cause of liberty will acquire a dignity and lustre it has never yet enjoyed; and an example will be set which cannot but have the most favorable influence on the rights of mankind. If, on the other side, our government should be unfortunately blotted with the reverse of these cardinal and essential virtues, the great cause which we have engaged to vindicate, will be dishonored and betrayed; the last and fairest experiment in favor of the rights of human nature will be turned against them; and their patrons and friends exposed to be insulted and silenced by the votaries of tyranny and usurpation.” 1 *Mad. Pap. App.* 11.

 part of mankind only, but as inseparable from human nature itself.

Is it asked, Why did not the Congress of the Confederation, if it intended to assert the rights of all men to liberty, take measures for the abolition of slavery throughout the states? The answer is easy: The Congress possessed no powers adequate to that object.

The confederation was a league, rather than an union. The delegates of the states in Congress had no powers, except those conferred upon them in terms by the Articles of Confederation, and those which resulted necessarily from the fact, that the Congress was the sole public representative of the states, in their confederate capacity. The Congress, therefore, could not intermeddle with the domestic concerns of the states. It could announce principles of justice and right, but it could give practical efficiency to them, as rules of law, only within territory subject to its exclusive jurisdiction.

I have already directed the attention of the court to a signal instance, in which, Congress, having acquired the exclusive right of property and jurisdiction over the territory northwest of the Ohio, embraced with alacrity, the opportunity thus presented, of proving to the world the sincerity of its declarations.

If any man be disposed to reproach the fathers of the republic with inconsistency and hypocrisy, in not giving practical effect to their declarations in favor of liberty and the rights of human nature, let him turn to the Ordinance 79 of 1787, and be silent. By that great instrument the Congress of the Confederation dedicated that immense national domain to liberty forever, and thus, by one illustrious act, manifested its own sincerity, and furnished a precedent for national action, in all future cases of like nature. By a single provision, the slavery, then existing in the territory, was abolished, and its future introduction was forever prohibited. And thus the Congress directly asserted, what it had before often indirectly declared, that slavery was incompatible with “the fundamental principles of civil and religious liberty,” which constitute the basis of American Government.1

1 All persons born in the territory are free. The ordinance fixed forever the character of the population in the region over which it extended. *Martin* v. *Chexnaider,* 20 *Mart. La. Rep.* 699.

Under the ordinance of 1787 the right of the master of a slave escaped into the territory northwest of the Ohio, was the *qualified* right of reclaiming him and conveying him out of

the territory into one of the original states in which he owed involuntary service or labor. 4 *Mart. La. Rep.* 385.

These several national acts, it seems to me, supply conclusive proof that it was never intended that the American Nation, should be, in any sense, or in any degree, implicated in the support of slavery: but, on the contrary, that it was the original policy of the government of the United States, to prohibit slavery, in all territory subject to its exclusive jurisdiction, and to discountenance it by the moral influence of its example and declarations, in the states and districts over which it had no legislative control.

Nor is there, as it seems to me, any room for doubt that it was the general expectation, at that time, that slavery, under the influence thus exerted, would disappear from the legislation and the polity of every state, at no very distant period. Evidences of this anticipation, and of the satisfaction with which the prospect was 80 contemplated, abound in the writings of Washington, of Jefferson, of Martin, and other distinguished men of that era: and I am not aware of any single instance of the utterance of a different expectation in any quarter.

Already, at the time of the promulgation of the ordinance, had seven states abolished slavery, or taken decisive measures for abolishing it: and the admission of Maine and Vermont, as nonslaveholding states, was looked upon as certain. On the other hand, there were only seven states in which no measures had been taken for the removal of slavery; and, although the admission of Kentucky and Tennessee was anticipated, I am not aware that history [furnishes any warrant whatever, for saying that they were to come in as slaveholding states. On the contrary, the powerful public sentiment in favor of emancipation in Maryland, Virginia, and North Carolina, shared,—especially in Virginia and Maryland, by nearly all the most illustrious public men of the time,—would justly authorize a different expectation. But, waving this, and conceding, against the weight of evidence, that emancipation was not anticipated in any state south of Pennsylvania, and that every state south of the Ohio was expected to come in as a slaveholding state, it is

still certain that the number of slaveholding states, within the limits of the United States, as they existed up to the close of the last century, could, in no event, exceed eleven. Under these circumstances, the promulgation of the ordinance, by which deliberate provision was made, by the unanimous assent of all the states, for the admission of five new nonslaveholding states, and, consequently, for the permanent ascendancy of the nonslaveholding interest in the councils of the confederacy, proves to me, beyond the possibility of 81 doubt, that it was not expected, at that time, that slavery would be a permanent institution of any state.

Such was the state of opinion at the time the constitution was framed; and the pages of Mr. Madison's report of the Debates in the Constitutional Convention are full of proofs of its influence upon the proceedings of that body. Every where we see the clearest evidence of deliberate purpose, to exclude all recognition of the rightfulness of slaveholding, and all national sanction to the practice, from every provision of the constitution. Mr. Madison, himself, declared that it was “wrong to admit in the constitution the idea, that there can be property in men.”1 Neither the word “slave,” nor the word “slavery,” nor any term equivalent to either, is to be found in the instrument; and the exclusion of these words, is a most emphatic censure of the practice represented by them. Even the word “servitude,” as we have seen, was stricken out on the motion of Governor Randolph of Virginia, and the word “service” inserted in the clause relating to fugitives from service, upon the express ground that the “former was thought to express the *condition* of slaves, and the latter the *obligation* of free persons.”

1 3 *Mad. Papers,* 1429.

It is quite true that the constitution contains several clauses which were designed to refer to slaves; but not one of them refers to slavery as a national institution, to be upheld by national law. On the contrary, every clause, which ever has been, or can be construed as referring to slavery, treats it as the creature of state law, and dependent, wholly, upon state law, for its existence and continuance. Under the constitution, as under the L 82

confederation, the national government was intended to be kept free from all connection with it; without power to establish or continue it any where; but pledged by every public act of the nation, from the date of the assembling of the first Congress, in 1774, to exert its legitimate authority to exclude it from all national territories, and to discourage it elsewhere, by the powerful influence of example and recommendation.

A different doctrine has sprung up and found favorers since; but that doctrine is not the constitution. It is a pernicious parasite, rather, which, planted by the side of the constitutional oak, by other hands than those of the Founders of the Republic, and nurtured with malignant care, has twined itself around the venerable tree, and now displays its poisonous fruits and foliage from every branch.

The Constitution:—

Miraturque novas frondes, et non sua poma.

I call upon this honorable court to restore the true construction of the charter of our union, by stamping with its decisive disapprobation, every attempt to introduce into it, what its framers studiously excluded from it, a sanction to “the idea that there can be property in men.”

The government of the United States, has nothing whatever to do, directly, with slavery. It may, indeed, and does recognize legal and political rights, growing out of the condition of certain persons, under the laws of the states, but it cannot, consistently with the letter or spirit of the constitution, regard these persons as slaves. Under the constitution, all the inhabitants of the United States are, without exception, persons,—persons, it may be, not free,—persons, held to service,—persons, who may migrate, or be imported,—but still, persons, clothed, so far as the constitution is concerned, 83 with those highest attributes of personality, which belong, of right and equally, unless the Declaration of Independence be a fable, to all men. The constitution takes notice indeed, of persons, held, under the

laws of the states, in peculiar relations; but it takes notice of such persons, by its own descriptions, and not by those which state laws furnish. It knows no slaves.

What is a slave? I know no definition, shorter or more complete, than this: A slave is a person held, as property, by legalized force, against natural right. Slavery is the condition in which men are thus held. The law, which enables one man to hold his fellow man as a slave, making the private force of the individual efficient for that purpose by aid of the public force of the community, must necessarily, be local and municipal in its character.1 It cannot, speaking with strict accuracy, make men property, for man is not, by nature, the subject of ownership. It can only determine that within the sphere of its operation, certain of the people may be held and treated as property by others. It can punish resistance to the authority of the master, and compel

1 All Jurists and Judges agree in this:

Thus the Supreme Court of Mississippi has said: “Slavery is condemned by reason and the laws of nature; it exists and can only exist through municipal regulations.” And the court adds, referring to the claim of freedom, set up in the case before it: “Is it not an unquestioned rule that, in matters of doubt, courts must lean *in favorem vitæ et libertatis.*” *Harvey* v. *Decker, Walker's Miss. Rep.* 36.

The same court, in a later case, said: “The right of the master exists, not by the force of the law of nature, or of nations, but *by virtue only* of the *positive law* of the State.” *State* v. *Jones, Walk. Rep.* 85.

The Court of Appeals of Kentucky has declared the same rule: “Slavery is sanctioned by the laws of this state, and the right to hold slaves under our municipal regulations is unquestionable; but we view this as a right, existing by positive law, of a municipal character, without foundation in the law of nature or the unwritten and common law.” *Rankin* v. *Lydia,* 2 *A. K. Marsh.* 467.

The same doctrine has been recognized by the Supreme Court of Louisiana.—"The relation of owner and slave is, in the states of this union, where it has a legal existence, a creature of the municipal law." *Lunsford* v. *Coquillon,* 14 *Mart. Rep.* 402.

So, also, the Supreme Court of Massachusetts, has held: "Slavery is a relation founded in force, not in right, existing where it does exist, by force of positive law, and not recognized as founded in natural right." *Commonwealth* v. *Aves,* 18 *Pick.* 215.

These authorities might be multiplied without limit. I will add only a single passage from the celebrated judgment in the case of the negro Somerset,—a judgment evidently delivered with great reluctance, hut extorted by the conviction that nothing less would satisfy the demands of the common law, after a consideration seldom bestowed on a return to a writ of habeas corpus, extended from the 9th Dec. 1771, to 22d June, 1772, and aided by two successive arguments by the most eminent counsel in England,—of whom it is enough to say that Dunning appeared for the return and Hargrave against it. The passage is this: "The state of slavery is of such a nature that it is incapable of being introduced by any reasons, moral or political, but only by positive law. It is so odious, that nothing can be suffered to support it hut positive law. *Whatever inconveniences, therefore, may follow from the decision,* I CANNOT SAY, that this case *is allowed or approved* by the law of England; and therefore, the black must be discharged." 20 *State Trials,* 75.

84 submission to his disposal. But, if I may be allowed to introduce here the homely, but most forcible expression of the great poet of Scotland:—

"A man's a man, for a' that."

The law of the Creator, which invests every human being with an inalienable title to freedom, cannot be repealed by any inferior law, which asserts that man is property. Such a taw may be enforced by power; but the exercise of the power must be confined within the jurisdiction of the state, which establishes the law. It cannot be enforced,—it can have no operation whatever,—in any other jurisdiction. The very moment a slave pasts

beyond the jurisdiction of the state, in which he is held as such, he ceases to be a slave; not because any law or regulation of the state which he enters confers freedom upon him, but because he *continues* to be a man and *leaves behind* him the law of force, which made him a slave. Even if the slave passes from one slave state into another, he is not held as a slave in the state to which he comes, by the law of the state which he has left. So far as that law is concerned, 85 he is free; for he is beyond its reach. He may remain enslaved, or, more properly speaking, he may be re-enslaved under the law of the state he enters: or, that law may refuse to recognize the relation imposed on him by the foreign law, and then he will be absolutely free. There are familiar examples of this, in many slave states. The law of Virginia does not permit the enslavement of native American Indians brought into that state since 1691. Such a person, therefore, though a slave in another state, becomes free, on being brought into Virginia, for the law which enslaved him cannot follow him there.1 So, also, in other slave states, slaves brought into them, under certain circumstances or for certain purposes, become free. The law of the state, into which they are brought, refuses to lend its aid to their enslavement, and the law of the state, whence they came, cannot reach them, having no force in another jurisdiction.

1 *Butt* v. *Rachel,* 4 *Mun.* 211. *Hudgins* v. *Wright,* 1 *Hen. & Mun.* 133. The first of these cases was argued by those eminent lawyers, Messrs. Wickham and Wirt: the latter of whom the writer is happy to acknowledge as his instructor in the law. They both agreed that slavery is an institution of positive law alone. The second is that memorable case, in which Chancellor Wythe endeavored, as almost the last act of his illustrious life, (for he died, January 8, 1806, and the cause was not heard on the appeal from his decision, until November 7, 1806,) to establish, upon the authority of the Constitution of Virginia, the common law presumption in favor of freedom, in that state. “Upon the ground that freedom is *the birthright of every human being,* which sentiment is *strongly inculcated in the.first article of the Bill of Righs,*” he laid it down as a general position that “whenever one person claims to hold another in slavery, the *onus probandi* lies on the claimant.” The Court of Appeals sustained the decision of the Chancellor, but disapproved of his

“principles and reasonings, except so far as the stone related to white persons and native American Indians,” without however attempting to shew that the doctrine was not clearly and necessarily inferrible from the Bill of Rights.

If I am correct, then, in the position that the Government of the United States, cannot, under the constitution, create, continue, or enforce any such relation as 86 that of owner and property, or,—what is, under the slave codes, the same thing,—of master and slave, between man and man, it must follow that no claim to persons as property can be maintained, under any clause of the constitution, or any law of the United States.

The clause in relation to fugitives from service is no exception to this remark.

Indeed, it may well be doubted, whether the majority of the convention regarded the clause as applicable, at all, to escaping slaves. The delegates from no state, except South Carolina, appear to have been anxious for any provision of the kind. And after it was introduced, various amendments were made, as we have seen, with the express purpose, of excluding any implication that slavery was “legal in a moral point of view,” and of adapting the language of the clause to “the obligations of free persons,” and not to “the condition of slaves.” It requires no great boldness, with the support of these facts, to affirm that the clause should be construed as providing only for the enforcement of the “obligations of free persons,” and not for reconsigning men to the “condition of slaves.”

Not insisting on this, however, nor waiving it, it seems to me quite certain, that this clause takes up and deals with no other relation than that of master and servant. It contains no recognition whatever, of any right of property in man. It establishes no rule in relation to negro or mulatto servants, which does not apply equally to white servants held by law. If, under the clause, a fugitive slave may be reclaimed, it is, not because he is a slave, but because he is a person held to labor. In that character, and only in that character, can he be reclaimed. After he has been brought back to the state 87 where he was held to service, he resumes the condition, whether of servant, apprentice, involuntary servant, or

slave, in which he was held prior to his escape: but while out of the state he is as free as any other person until reclaimed.

It follows from this, that any provisions which would be unconstitutional, in their application to other persons, are equally unconstitutional, in their application to escaping servants. Any immunities secured by the constitution to “persons” without distinction, belong, of right, to “persons” escaped from service.

So far as the act of 1793 authorizes the reclamation of servants, escaped into the *territories* of the United States, it is clearly unconstitutional. If a citizen of a territory cannot sue or be sued in the courts of the union, as a citizen of a state,—surely a person, escaped into a territory, cannot be reclaimed, under a clause, which authorizes, only, the reclamation of persons escaped into a state. It seems highly probable that no provision for the reclamation of servants escaping into a national territory was made, because the ordinance had already provided for such reclamation as to servants escaping from the original states. And this is made almost certain by the fact, that the constitution and the ordinance are almost contemporaneous documents, and the provision as to reclamation in the former, was taken, substantially, from the latter.

So far, also, as the act of 1793 undertakes to confer judicial powers on state magistrates, it is clearly void. The judicial power of the union, cannot, except in open breach of the constitution,1 be conferred on courts, not

1 *Martin* v. *Hunter's Lessee,* 1 *Wheat.* 304.

88 ordained and established by Congress, but ordained and established by state Legislatures;—not responsible to the general government, but responsible to the states only.

Besides, Congress, under the constitution, can appoint no federal officers whatever. By the second section of the second article it is made the duty of the President of the United States, with the advice and consent of the Senate, to appoint all judicial officers. Congress

may, indeed, vest the appointment of inferior officers in the President alone, or in the courts of law, or in the heads of departments; but it can retain no such power to itself. Yet, if this act be constitutional, Congress can appoint federal officers, by thousands, at a breath; for, by this act, all, who then were or might afterwards become magistrates of counties, cities, and towns corporate, are constituted judges of the United States, with a vast and most important jurisdiction. It were mere waste of words to argue that the act, to this extent, must be unconstitutional. It is true that this court in the Prigg case, held that, in relation to claims of fugitives from service, state magistrates *may* act: but your honors were careful not to affirm that the state magistrates were clothed, by the law, with any judicial authority. If state magistrates act, their action must be justified, if at all, upon the ground that they are the *auxiliaries* of the master, in exercising *the power of recaption,* not under the law, but under the constitution. The magistrate must derive his authority from the master, not from the act of Congress.

I submit, further, that the act is unconstitutional, in all its leading provisions.

It authorizes seizure and confinement, by private force, without legal process. But the third clause of the 89 fifth amendment of the constitution is in these words, “No person shall be deprived of life, liberty, or property, without due process of law.” It is vain to say that the fugitive is not a person: for the claim to him can be maintained only on the ground that he is a person. It is vain to say that the amendment did not regard fugitives from service as persons within its intendment. Not only is there no authority for any such assertion, but it is directly contradicted by historical documents. The recommendation for this amendment came from Virginia, and, as proposed by her legislature, it provided that “no free man shall be deprived of life, liberty or property, but by the law of the land.”1 Congress altered this phraseology, by substituting, for the words quoted, these: “No person shall be deprived of life, liberty, or property, without due process, of law.” Now, unless it can be shewn that no process of law at all, is the same thing as due process of law, it must he admitted that the act which authorizes seizure without process, is repugnant to a constitution which expressly forbids it. And this right to seize, and hold, and take before a magistrate

constitutes the very essence of the act. Without this right, the act is of no avail whatever. If it fails in this, it fails altogether.

1 Consult 2 *Elliott's Debates,* 483, for the amendment as proposed by Virginia: also, 4 *Elliott's Debates,* 216, for the same amendment, as proposed by New York, nearly in the terms in which it was finally adopted.

Mr. Justice Story, delivering the opinion of a majority of the court, intimated, in the Prigg case, that the master of an escaping servant might, at common law, retake him and reconvey him to the place whence he escaped, in the exercise of the right of recaption.2 The learned M

2 16, *Peters* 613.

90 Judge relied upon the authority of Blackstone; and Blackstone, in support of the proposition which he lays down, refers to no other authority than Roll, a reporter and author of the time of James the First, in the fifteenth year of whose reign, the last case of villeinage came before an English court.1 This, certainly, is not the highest authority for the middle of the nineteenth century, and for a country whose institutions are founded on the doctrine of personal liberty. But it seems to me quite clear that Blackstone never intended to sanction the doctrine imputed to him. He is speaking of the case where one has deprived another of his servant and wrongfully detains him, and not of an escaping servant at all. His obvious meaning is, that, in the case he puts, the master may retake the servant, with the servant's assent. The condition, by which he limits the right of recaption, proves this: The master may retake, “so it be not in a riotous manner, or attended with a breach of the peace.”2 And where was it ever held, since the days of villeinage, that it is not a breach of the peace in England, for a master to seize a servant, and compel him by force, to return to a service, which he has left? I affirm, boldly, that there is no such right of recaption, as is claimed, at common law, and no such right has been recognized in England since the days of villeinage. Mr. Hargrave, in the case of Somerset, stated, as an undeniable proposition that “the laws of England will not allow the servant to invest the

master with an arbitrary power of correcting, imprisoning or alienating him."4 And there can be no recaption, against consent, without imprisonment. And Lord Hobart says: "The body of a freeman

1 20 *State Trials,* 41.

2 2 *Black. Com.* 4.

2 20 *State Trials,* 50.

91 cannot be made subject to distress or imprisonment, by contract, but only by judgment."1 Certainly the constitution did not intend to confer any right of recaption on the masters of escaping servants, for every such recaption is a seizure and imprisonment without process, which the constitution expressly forbids.

1 *Hob.* 61. In Tennessee, even as to slaves, the right of recaption does not exist. Mr. Justice Catron, then Chief Justice of Tennessee, terms it "the exploded doctrine of recaption." *Marshall* v. *Pennington.* 8 *Yerg.* 431. Sea also, 1 *Chitty's General Prac.* 640.

But the amendment, prohibiting imprisonment or other privation of liberty, without process, is not the only clause of the constitution infringed by this act. It is equally repugnant to that provision, which declares that "the right of the people to be secure in their persons * * * against unreasonable searches and seizures shall not be violated." I ask, how can the people be subjected to seizures more unreasonable, than under this act of Congress? Even upon the unwarrantable assumption that the escaping servant has no rights, the act still violates this provision of the constitution. The claimant must necessarily select the object of seizure. He is not confined, by the act, to negroes, nor to slaves. He may seize any one, whom he chooses to claim as an escaping servant, and take him before a judge, or a magistrate, without authority except as the claimant's agent. He may be mistaken. He may intend to kidnap. No matter, he may seize, confine, transport; being responsible only in an action for a wrongful taking, if his victim shall ever be fortunate enough to find an opportunity to bring one. Surely, an act which authorizes seizure by private force,

upon mere claim, violates that security from unreasonable seizure, which the constitution guaranties to the people.

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The constitution, also, declares that, “In suits at common law, where the value of the matter in controversy, shall exceed twenty dollars, the right of trial by jury shall be preserved.” Of what value is this provision, if Congress may, by legislation, provide a mode, in which every man, may, at the option of a slave claimant, be put upon trial of his liberty without a jury.1 Will it be said, that the value of a man or of his liberty is not mensurable by a pecuniary standard, and, therefore, that the constitutional guaranty does lint apply? I answer, that if Congress cannot authorize the less, surely it cannot authorize the greater aggression upon individual right. Or, will it be said that the proceeding is not one at common law? I reply, where did Congress obtain the authority to authorize the enforcement of claims to services, in a mode at variance with the course of the common law? Not certainly from any grant in the constitution; for, not only does that instrument contain no such grant, but it expressly prohibits the mode of enforcing the claim, which Congress has adopted, namely, imprisonment without process. I insist, therefore, that Congress has no power to authorize the seizure and trial of any person without a jury. If Congress has such power in this case, then, in every other, where the constitution confers or guaranties a right, Congress may, without regard to constitutional restriction or limitation, adopt its own mode of enforcing that right, and the people must

1 An act of the Legislature of Kentucky provided, that negroes and mulattoes coming or being brought into the state, should be arrested, and if, upon trial before the county court, it should appear that they came into and continued in the state, contrary to law, they should be required to give bond for removal, and on failure, should be sold for one year. It did not require the intervention of a jury, and the Court of Appeals, for this reason and to this extent, held the act to be unconstitutional. *Doram* v. *Commonwealth,* 1 *Dana,* 331.

93 submit. If this be so, the constitution is waste paper, and we live under a despotism.

The provisions of the constitution, contained in the amendments, like the provisions of the ordinance, contained in the articles of the compact, were mainly designed to establish as written law, certain great principles of natural right and justice, which exist independently of all such sanction. They rather announce restrictions upon legislative power, imposed by the very nature of society and of government,1 than create restrictions, which, were they erased from the constitution, the Legislature would be at liberty to disregard. No Legislature is omnipotent. No Legislature can make right wrong; or wrong, right. No Legislature can make light, darkness; or darkness, light. No Legislature can make men, things; or things, men. Nor is any Legislature at liberty to disregard the fundamental principles of rectitude and justice. Whether restrained or not by constitutional provisions, there are acts beyond any legitimate or binding legislative authority. There are certain vital principles, in our national government, which will ascertain and overrule an apparent and flagrant abuse of legislative power. The Legislature cannot authorize injustice by law; cannot nullify private contracts; cannot abrogate the securities of life, liberty and property, which, it is the very object of society, as well as of our constitution of government, to provide; cannot make a man judge in his own case; cannot repeal the laws of nature; cannot create any obligation to do wrong, or neglect duty. No court is bound to enforce unjust law; but, on

1 *Per Marshall, C. J. in Fletcher* v *Peck,* 2 *Cond. Rep.* 421.

94 the contrary, every court is bound, by prior and superior obligations, to abstain from enforcing such law. It must be a clear case, doubtless, which will warrant a court in pronouncing a law so unjust that it ought not to be enforced; but, in a clear case, the path of duty is plain. I rejoice that I have the sanction of this Court to all these positions. I rejoice that I am able to add, that much of the language, in which I have stated them, is taken from one of its judgments.1

1 *Calder* v. *Bull,* 1 *Cond. Rep.* 173. See also, *Duarris on Statutes,* 11. All Writers agree that there is a rule of right, which is of superior obligation to every human law. It is called

by Aristotle, ‘O and I submit two translated extracts from his writings, as descriptive of it. “The law of nature” he says, “is inflexible and has always the same force; as fire burns alike here, and among the Persians.” *Rhet. B.* 5, *c.* 10. “For what all men divine is true,” he says in another place, “that, by nature, there is a common rule of right and wrong, which has its origin in no common consent, or compact among men.” *Rhet. B.* 1, *c.* 13, 15.

Cicero speaks frequently of this law: “Est vera ratio, naturæ congruens, diffuse in omnes, constans, sempiterna.”—“Est recta ratio, numine deorum tracta, imperans honesta, et prohibens contraria.”—“Lex vera atque princeps, apta ad jubendum et ad vetandum, ratio est recta summi Jovis.”

An eminent christian moralist and divine, thus states the same truth: “The law of nature is the only rule and measure of all laws.” *Jeremy Taylor's Works, Vol.* 3, *pp.* 197 *and* 212.

And an Apostle sums up the whole matter in these words: “We ought to obey God rather than men.” *Acts* 5, 29.

I see not how the judicial enforcement of the claim to property in man can be at all reconciled with these principles; for that claim is admitted by all jurists, and by none more emphatically, than by those distinguished lawyers, whose opinions I have cited from the reports of slaveholding states, to be, not only unsupported by, but directly against natural right.2

2 It will be observed that I do not rely on the authority of doctors of theology, for an account of the nature of slavery. I prefer that of jurisprudents, accustomed to consider questions of right and justice. It will, in future times, be regarded, doubtless, as a melancholy proof of the corruption of religion in our day, that it ministers were so often found among the justifiers and advocates of slavery; and it will be looked upon, probably, as “evidencing, (I use the words of Judge Read, of the Supreme Court of Ohio,) a sort of

moral insanity, a breaking up as it were, of the faculties to perceive or distinguish moral truth." See 2 *West. Law Jour.* 286.

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However this may be, I cannot doubt that the act of 1793, and much more the law of reception, which has been thought to be contained in the constitutional provision relating to fugitives from service, fall within the very terms of one of the descriptions of unauthorized legislation given by this court, in *Calder* v. *Bull;* for they make a man the judge in his own cause, and, even more, the executioner of his own sentence. The act of 1793 authorizes the claimant to seize the defendant, without process; to take him, by force, before any magistrate he may select; to hold him, by force, while the magistrate examines the evidences of claim; to remove him, by force, when the certificate is granted. The defendant, thus seized and held by force, has no rights, under the law. The act affords him no opportunity to adduce evidence, and imposes no duty on the magistrate to hear it, if adduced. On the other hand, the claimant is allowed to make out his claim by affidavits, which, taken by himself and without cross examination, will always be partial, and, often, false. And, upon such evidence, while the defendant is under such duress and without any right to be heard, the magistrate is to decide. To complete the atrocious business, and leave no semblance of justice whatever to the transaction, the magistrate is entitled to no compensation for his services, under any law, state or federal; but is left to make such bargain with the claimant as he may. What is this, but to make the claimant, judge, jury and sheriff in his own cause, and to establish his will as law? What is it but to legalize assault and battery, and private imprisonment? I say fearlessly, that such acts of legislation as this, are subversive of the fundamental principles, on which all civil society rests. Let such acts be passed in relation to 96 other claims. Let every man be authorized to enforce his demands in this summary manner. If he finds a horse, which he thinks his, in the possession of another, instead of resorting to due process of law, and the old fashioned replevin, let him seize the animal, take him before *his own hired magistrate,* and prove his claim by affidavits. If he claims the services of another, which which that

other will not perform, instead of suing him for breach of contract, let him drag his reluctant neighbor before his magistrate, establish his claim, and then remove him to his task. How long would society hold together, if this principle were carried into general application?

But I am not obliged to resort to any general principle of the natural law, however firmly established. I find firm footing in the constitution, and I take my stand upon its express provisions. The American People, speaking through the constitution, have forbidden Congress to enact, and this Court to enforce any law which authorizes unreasonable seizures, or privation of liberty without due process of law. This prohibition, in my humble judgment, nullifies the act of 1793.

A single proposition remains to be considered. I shall maintain that the act of 1793 is void, because Congress had no power at all to legislate in relation to escaping servants.

I have already shown that the right of recaption, exercised upon servants against their will, had no existence at common law, at the time of the adoption of the constitution. It is only necessary to add here, that if the right existed, as to servants, in any of the states, 97 it could not be enforced in other states, or in national territories, being a right dependant on local law, and incapable of being extended into another jurisdiction. It is certainly incumbent, then, on those who claim, that, by the constitution, the general law and presumption in favor of liberty are set aside to give room for this right of recaption, to make out a clear case, and produce express words. Far from doing this, however, they are able to shew no intimation of any such right in the constitution; while, on the contrary, we produce an express prohibition against the exercise of any such power, under any act of Congress.

What, then, is the true construction of the constitutional provision in relation to escaping servants?

I insist, most respectfully, but most earnestly, that the whole clause shall be interpreted by the ordinary rules of construction, applicable to all provisions of the constitution. It

seems to me indefensible, “in order to clear the case of difficulty,”1 to adopt a special rule of interpretation for this particular clause. It seems to me, impossible, after a deliberate consideration of the facts of history, and of the most authentic account2 of the circumstances which attended the incorporation of the clause into the constitution, to maintain that the object of the provision was “to secure, to the citizens of the slaveholding states, the complete right and title of ownership in their slaves, as property, in every state of the union into which they might escape from the state where they were held in servitude.” Nor have I been able to discover any historical warrant, or any warrant of any kind, for the statement, that the clause in question “constituted a fundamental article, without N

1 16 *Peters* 610.

2 See *Madison Papers, cited ante p.* 40.

98 the adoption of which, the union could not have been formed.”

The provision is, undoubtedly, in restraint of liberty, and it is to be construed strictly. One of the leading objects of the constitution itself was to secure personal freedom: and every particular clause, in derogation of this general object, should be restrained within the plain and necessary import of its terms. In order to ascertain the true sense of any clause, the whole of it should be taken together. No rule of interpretation should be applied, which will not be regarded as valid, when occasion may require, in the construction of every other.

I submit that these are the true principles upon which the provision concerning fugitives from service should be construed, and shall endeavor to ascertain its true import, as to the mode of reclamation, by their aid.

Taking the whole clause together, and examining it in the light of history, I cannot doubt that the intention was, to impose the duty of giving effect to the right of reclamation, upon the states. I would willingly think otherwise. All, or nearly all, the citizens of the free states would, I doubt not, gladly leave the whole responsibility of legislation, upon this subject,

to Congress. But, looking at the terms of the provision, and comparing it with similar provisions then in existence, it seems to me clear, that Congress cannot, constitutionally, legislate upon it.

The great purpose of the framers of the constitution was to create a national government, and confer upon it adequate powers. A secondary purpose was to adjust and settle certain matters of right and duty between the states, and between the citizens of different states, by permanent stipulations, having the force and effect of 99 treaty obligations.1 Both objects were accomplished. The constitution establishes a government, declares its principles, defines its sphere, prescribes its duties, and confers its powers. It also establishes certain articles of compact or agreement between the states. It prescribes certain duties, to be performed by each state and its citizens, towards every other state and its citizens: and it confers certain rights upon each state and its citizens, and binds all the states to the recognition and enforcement of these rights. These different ends of the constitution,—the creation of a government and the establishment of a compact,—are entirely distinct in their nature. If all the clauses of compact in the constitution were stricken out, the government created by it would still exist: and, if the articles and sections establishing a form of government were abrogated, the clauses of compact might still remain in force, as articles of agreement among the states. The clauses of compact confer no powers on the government: and the powers of government cannot be exerted, except in virtue of express provisions, to enforce the matters of compact.

1 *Commonwealth* v. *Aves,* 18 *Pick.* 220, where this view is set forth with clearness and force.

The clause, in relation to fugitives from service, is nothing else than a covenant or compact, between the states.1 It has nothing, whatever, to do with the creation of a government, and it confers no powers, whatever, upon the government created by other provisions. It declares that no person, held to service in any state under its laws, escaping into another, shall be discharged frown the service, to which he was thus held in the state

from which he fled, but shall be delivered up, on claim of the party to whom the service may be due. It restrains the operation 100 of state laws in a particular class of cases, and it obliges each state to the performance of certain duties to the citizens of other states. It is, in the strictest sense, a clause of compact; and the natural, if not necessary, inference from its terms, seems to be that its execution, like that of other compacts, is to be left to the parties to it.

Four similar clauses stand, in juxtaposition, in one article of the constitution. The first stipulates that full faith shall be given in each state, to the public records and judicial proceedings of every other state: the second, that the citizens of each state shall enjoy the immunities of citizens, in the several states: the third, that persons, charged with crime in any state and fugitive from justice, shall, if found in any other state, be delivered up, on demand of the executive authorities of the state from which they fled: the fourth, is the clause under consideration. There are clauses in other articles which prohibit the exercise of powers by the states: but there are no others, I believe, in the constitution, as originally adopted, intended to secure positive rights to the citizens of each state in all the states. This circumstance is entitled to weight in determining the character of these provisions; and, it certainly points to the conclusion, that they are in the nature of treaty covenants, provision for the execution of which is to be made by the legislation of the parties. This conclusion is, indeed, excluded as to the first of them, by an express provision that Congress may legislate: but the omission of a similar provision in connection with the others mightily confirms my position as to them. Why make the provision as to the first clause, and omit it as to the other three? It must have been done deliberately and 101 of purpose. Why do it, unless the convention *designed* that Congress *might* legislate in reference to records, but *not* in reference to the rights stipulated for in the other clauses? And is not the reason for the distinction plain? Would not the convention naturally give power to prescribe the proof and effect of records, which could not affect the personal liberty of the citizens?—while they would scrupulously abstain from giving any such power in regard to the subjects of the other clauses, because its exercise would necessarily

interfere with the great first right and duty of the State Governments to protect the rightful claims, to personal liberty and security, of all persons within their several jurisdictions.

Another circumstance deserves to be seriously considered. All the provisions I have just enumerated, were taken, with modifications, from instruments in which they stood, without question, as clauses of compact, and nothing else. The provisions in relation to records, to immunities, and to fugitives from justice, were taken from the Articles of Confederation.1 The provision in relation to fugitives from service, was taken from the Ordinance of 1787.2 What evidence is there that the Convention, when it transferred these clauses from the Articles and the Ordinance into the Constitution, had any intention to change their nature. Standing where they did, they conferred no power on the general government; what reason is there for holding that they confer such power, standing where they now do? The clause in relation to records, as it stood in the articles, included no provision authorizing legislation by Congress The Convention, on transferring the clause to the constitution, appended

1 See Articles of Confederation, Art. 4, in 3 *Story's Laws,* 2079.

2 See the Ordinance, 3 *Story's Laws,* 2078.

102 a provision authorizing such legislation; but they appended no such provision to the other clauses. *Expressio unius, exclusio est alterius.* I see not how the inference can be resisted, that it was not the intention of the Convention to authorize legislation by Congress on the subjects of the other clauses.

There is another, and wholly independent reason for denying the constitutional competency of Congress to legislate in regard to fugitives from service. The whole legislative power of Congress is derived either from the general grant in the eighth section of the first article of the constitution, or from special provisions in relation to particular subjects. We have already seen that there is no special provision authorizing the legislation in question; we must look for such authority, then, in the general grant.

That grant is in these words: “Congress shall have power * * * to make all laws, necessary and proper for carrying into execution all the powers vested by the constitution, in the government of the United States, or any department, or officer thereof.”—It is quite certain that the clause, relating to fugitives from service, vests no power in the national government or any of its departments, or officers. How then can the conclusion be avoided, that Congress has no power to legislate on this subject?

It is urged in the opinion delivered by Mr. Justice Story, that this is too narrow a view of the power of Congress; and various examples are given of legislation by that body, in cases where no legislative power has been directly conferred upon it. But it will be found, I think, that every example fails to sustain the view of the constitution, in support of which it is adduced.—Acts of apportionment, acts to carry treaties into effect. 103 and acts to secure the privileges of members of Congress, acts to suspend the writ of habeas corpus,—all come under the head of laws, necessary and proper for carrying into execution, powers vested in the government, or its departments, or officers. Nor is it going too far to say, that where a duty is enjoined upon the government, or its departments, or its officers, Congress may, by legislation, provide for its performance. Where the constitution enjoins a duty, it is a necessary inference that it gives power to perform it. But the difficulty is, that the fugitive servant clause does not purport to confer a power, or enjoin a duty, on the general government, or any of its departments, or officers.

The opinion, indeed, goes farther, and maintains that Congress may provide for the allowance and execution of of the writ of habeas corpus, when not suspended, and generally, that where a right is expressly given, or a duty expressly enjoined by the constitution, Congress may legislate for the protection of the right or enforcement of the duty.1 Upon no ground, narrower than this, can the right of Congress to legislate for the reclamation of escaping servants be maintained. But the powers of Congress have not hitherto been supposed to be so extensive.—If they are, they certainly warrant the legislation in question, and much more. Congress may, in the exercise of these powers, nullify any state legislation which the constitution forbids. It may, and should, under

the clause which secures to the citizens of each state the immunities of citizens in all the states, enforce, in South Carolina and Louisiana, the rights of the negro citizens of Massachusetts, and the quadroon citizens of Ohio.

1 16 *Peters,* 618.

104 It may, also, and should, under the clause which forbids privation of liberty, without due process of law, provide for the abolition of slavery throughout the United States. If the premises, furnished by the opinion of Mr. Justice Story, are valid, these, certainly, are legitimate inferences. The doctrine, that, in all cases, where the constitution secures rights to states or individuals, Congress has power to legislate for the protection and enforcement of those rights is original, I think, in that opinion. In view of the consequences which must spring from it, it seems hardly possible that it can be sustained.

It is insisted, however, that great weight is due to contemporary construction; and that the exercise of the power of legislation by Congress, in the enactment of the law in question, should be received as strong evidence of the constitutional right to legislate. But when it is considered that this act of Congress is plainly unconstitutional in some of its provisions; and that, before its enactment, all, or nearly all the states,—whose practical exposition of their own powers carries equal authority with a similar practical exposition by Congress,—had legislated in reference to fugitives from justice or fugitives from service, and that the whole of this legislation must be swept from their statute books, if the act be held constitutional; I cannot think that the mere claim and exercise of power by Congress, in derogation of a similar claim and exercise by every state Legislature, can have much influence upon the determination of the question at issue. Is it not as probable that Congress has mistaken the extent of their powers, as it is that the state Legislatures mistook the extent of theirs? Congress, certainly, without employing 105 state authorities, cannot readily execute these powers; and it cannot, constitutionally, impose duties on state officers. This objection applies to the provision, in regard to fugitives from justice, as much as to that in regard to fugitives from service. The former undertakes, indeed, to impose duties on the Governors of States, and if it is constitutional, all state legislation on

the same subject is unconstitutional. But how can it be enforced? Can this Court issue its mandamus to a State Executive, and compel the delivery of a fugitive?

It is claimed, further, that this power of Congress has been sanctioned by judicial decisions. Opinion and authority, on this subject, were nearly balanced, at the time of the decision in the Prigg case. That decision, so long as it shall stand, settles the question, at least for this court, in favor of the power; but if the considerations, urged in this argument, shall prevail, the honored authority of this tribunal will be placed in the opposite scale.

It is said, finally, that the nature of the provision furnishes solid reasons for the conclusion, that it could not have been the intention of its framers to entrust its execution to state authorities. This is dangerous ground on which to build a construction of the constitution, in disregard of the plain import of its terms. It may be well met by a direct negative, and by the assertion that the nature of the provision proves, that, neither the Convention, which formed, nor the People, who adopted the Constitution, could have intended to entrust to Congress any legislative power on the subject. Let it be supposed that when the clause was under discussion, it had been proposed to annex a provision in these words; “and Congress shall have power to appoint officers, and provide by law, for the arresting and delivering up of persons O 106 escaping, and to provide, also, for the punishment of all interference with the right herein secured, by harboring, or otherwise:” Can any man believe that such a clause would have received the assent of the Convention? or, that, a constitution with such a clause in it, could have obtained the ratification of the States? It must be remembered that the States existed before the Constitution, and that the fundamental law of each asserted and guarantied the absolute, inherent and inalienable rights of all the inhabitants or citizens: and it can hardly be supposed that any state, especially any non-slaveholding state, would have agreed to a constitution which would withdraw, from any of these rights, the ample shield of the fundamental law, and leave them exposed to the almost unlimited discretion of Congress, and of officers appointed

by Congress? If they could, they must have strangely forgotten the great principles which hallowed their recent struggle.

Am I mistaken, then, in thinking that the whole argument establishes the proposition, that the power to legislate, in reference to escaping servants, is “a power not delegated to the United States by the Constitution, nor prohibited by it to the states, and is, therefore, reserved to the states respectively, or, to the people?”

Much yet presses for utterance: but I have already trespassed too far on the patience of the court.

I have presented, defectively, doubtless, and, perhaps, unsuccessfully, but honestly, and with the best effort of my humble ability, the great principles, legal and constitutional, which, in my judgment, govern this case: and now, with a perfect assurance that all I have urged will receive from your honors a full, patient, and indulgent consideration, I leave the controversy in your hands.

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It is the chief glory of Courts of Justice, that they are regarded as the safest sanctuaries of Human Freedom. May such ever be the honorable distinction of this court!

It is a maxim of the common law that he who will not favor liberty, shall be held accursed. “ *Execrandus, qui non favet libertati!* ” The courts of England, ever presuming, in obedience to this maxim, in favor of freedom, extinguished villeinage, and established an impregnable barrier against the introduction of a new slavery. May I not trust that the favor, shown to Liberty by the courts of the Chief Monarchy of Europe, will not be allowed to surpass that which Liberty will receive, from the courts of the Chief Republic of America?

I am aware that this court will administer the law as it is written in the Constitution: but may I not confidently expect that you will not, willingly, allow any construction of that honored instrument, which will bring its provisions into conflict with that other Constitution, which,

rising, in sublime majesty, over all human enactments.—antedating them all, surviving them all,—finds its “seat in the bosom of God,” and utters its “voice,” as “the harmony of the world?”

Upon questions,—such as are some of those involved in this case,—which partake largely of a moral and political nature, the judgment, even of this Court, cannot be regarded as altogether final. The decision, to be made here, must, necessarily, be rejudged at the tribunal of public opinion—the opinion, not of the American People only, but of the Civilized World. At home, as is well known, a growing disaffection to the Constitution prevails, founded upon its supposed allowance and support of Human Slavery: abroad, the national character suffers under the same reproach. I most earnestly 108 hope, and,—I trust it may not be deemed too serious to add,—I most earnestly pray, that the judgment of your honors in this case, may commend itself to the reason and conscience of Mankind; that it may rescue the Constitution from the undeserved opprobrium of lending its sanction to the idea that there may be property in men; that it may gather around that venerable charter of Republican Government the renewed affection and confidence of a generous People: and that it may win for American Institutions the warm admiration and profound homage of all, who, everywhere, love Liberty and revere Justice.